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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

PHILOMENA DOOLEY, et al.,

Petitioners,

—v.—

KOREAN AIR LINES, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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On the Petition:

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QUESTION PRESENTED FOR REVIEW

Does the Warsaw Convention Treaty provide the exclusive cause of action for passenger deaths and injuries in international accidents and bar recovery of punitive damages allowed by applicable federal maritime law?

LIST OF PARTIES TO THE PROCEEDING

The following plaintiffs are parties to this proceeding: Philomena Dooley, Kimberly Saavedra, Edward Ocampo, Maureen Lombard, David Powrie, Julia Lombard, Mayuree Siripoon, Thomas Mahalek, Michael Kole, Marie Gill, Betty Lim, Maureen Oren, David WuDunn, Renay Bevins, Jose Bolante, Robert Caltabellatta, Sungwha Oh Yoo, Jwa Hong, Christina Ting, Sarah Swift, Kyung Hwa Park, Hee Sook Lee, Ul Ran Lim, Eun Jung Oh, Hans Ephraimson-Abt, Jeung Em Yun, Elisa Chan, Maria Beirn, Robert Speir, Dorothy Jones, Michael Jones, Cecille Chuapoco, Felino Bayona, Eric Forman, Marsha Maikovich, Parvaneh Zareh, Nan M. Oldham, In Jig Lin, Louella Nassief, Rosario Bayona, Dorothy Irwin, Marjorie Zicherman, Willie James, Roberta Cruz, Robert Boyar, Elia Baek, Yon Shen Liu, Chan May Kung, Huey Ping Yeh-Wang, Liu-Tsuei Lee, Yueh-Lan Liu, Tzen Chang, Hsing-Wu Wang, Chi-Chin Lin, Lih-Hwa Yu Chen, Andi Donovan, Leo Fitzpatrick, Mildred Burgess, Shirley Katz, Kathryn McDonald, William Cunningham, Chong Cha Kim, Jae Gwan Sim, Ahduk Homlaor, Mo Hsiang Lai Tsao, William Stevens, Lolita DoFredo, Richard Bowden, JoAnn Dunn, Gerard Metcalf, Alexander Alcabasa, Terry Weng, Soon Hi Choi Lee, Diana Chao, Sandra Baker Yoon, Charles Fonville, Daisy Bickell, Republic Bank of New York, Rudolfo Cruz, Emelinda Lantin, Shan Leung, Erlinda Alora, Akemi Hammerstein, Indep, Lenore Lebow and Antonio Guevara.

The defendant is Korean Air Lines, Ltd.

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OPINIONS BELOW

The opinion, including the dissent, of the Court of Appeals for the District of Columbia Circuit (A-1, *infra*)¹ is reported at 932 F.2d 1475 (D.C.Cir. 1991). It reversed a district court determination made at trial without a formal opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on May 7, 1991. In two orders dated July 5, 1991, the Court of Appeals denied KAL's petition for rehearing or rehearing *en banc*. A-52-3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

1 References to "A-__" are to pages in the Appendix of this Petition.

PROVISIONS OF LAW INVOLVED

This case raises the interpretation of Articles 17, 24 and 25 of the Warsaw Convention Treaty² and its relationship to federal maritime law of punitive damages.

WARSAW CONVENTION

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 24

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the

2 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note (1976) (Warsaw Convention).

court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

STATEMENT OF THE CASE

Petitioners are the surviving family members and estate representatives of one hundred thirty-seven passengers killed in the Korean Air Lines (KAL) disaster of September 1, 1983.

KAL flight 7 departed from Kennedy Airport, New York bound for Seoul, South Korea.

KAL 7's three pilots flew the plane off course on a shortcut route for over five hours, including three hours in Soviet airspace. The danger of Soviet airspace was well known to KAL and its flight crews by virtue of specific training, warnings and the 1978 shootdown of another KAL airliner in Soviet airspace, killing and injuring fourteen passengers.

KAL 7 was a 747 aircraft equipped with numerous navigational instruments which continuously informed the pilots of their exact position. Yet those pilots falsified a series of position reports to air traffic controllers to conceal their deviation. While over the Sea of Japan off Sakhalin Island, U.S.S.R., the plane was fired upon by a Soviet military fighter and crashed, killing all aboard.

Prior proceedings

Actions were filed against KAL in various district courts and transferred pursuant to 28 U.S.C. §§ 1404 and 1407 to the United States District Court of the District of Columbia.

Plaintiffs' complaints sought wrongful death and survival damages against KAL, including claims for punitive damages under federal maritime law.

Plaintiffs' actions are governed by the 1929 Warsaw Convention. This treaty together with the Montreal Agreement³ impose a damage cap of \$75,000 on passenger death and injury claims. The damage limitation and liability exclusions, however, do not apply if the airline commits wilful misconduct. Article 25 provides that an airline responsible for wilful misconduct may not assert "the provisions of this Convention which exclude or limit . . . liability."

On July 17, 1989, a consolidated trial on liability (wilful misconduct) and punitive damages commenced.

Shortly before the trial, KAL moved to dismiss plaintiffs' punitive damage claims by asserting that the plaintiffs' exclusive cause of action was under the Warsaw Convention and it barred punitive damages and preempted contrary federal maritime law.

During the trial, the district court denied KAL's motion to dismiss plaintiffs' punitive damage claims.

The jury verdicts of wilful misconduct and punitive damages. On August 2, 1989, the jury rendered a special verdict, finding that KAL committed wilful misconduct and was a proximate cause of the passengers' deaths.

In a subsequent verdict, the same jury awarded punitive damages in the amount of \$50,000,000 to be shared equally by the plaintiffs (about \$362,000 for each passenger's family).

KAL thereafter moved and the district court denied judgment notwithstanding the verdicts or for a new trial. KAL then appealed.

The Court of Appeals' decision. On May 7, 1991, the Court of Appeals for the District of Columbia Circuit unanimously affirmed the wilful misconduct verdict.

3 Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900, Approved by Executive Order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966), reprinted in Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 515-16 (1974).

By a 2-1 majority, however, the Court of Appeals vacated the punitive damages award.

The majority opinion vacating the punitive damage verdict. Two judges concluded that the Article 17 provision that "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger . . ." barred recovery of punitive damages allowed by federal maritime law.

The majority found that while "the Convention does not address the issue of punitive damages . . .", such recoveries "are incompatible with the liability scheme set forth in Article 17." 932 F.2d at 1485-6, A-20-1. In the court's view, an award of punitive damages "would be contrary to the expectations" of the treaty's civil and common law drafters. *Id.* at 1487, A-23.

The majority recognized the conflict among the circuits regarding whether the Convention "preserves independent domestic causes of action based on tort law" or "provides the exclusive cause of action." *Id.* at 1488, A-25. But the court stated: "[i]n deciding only that punitive damages are contrary to the Convention, we need not take sides in the exclusivity debate." *Ibid.*

The court considered Article 24 which in relevant part states that: "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention . . . without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." The majority found that "article 24 provides a clear textual basis for concluding that the Convention overrides liability awards that are inconsistent with Article 17." *Ibid.*

The court also addressed the treaty's Article 25 which applied by virtue of the jury's verdict that KAL committed wilful misconduct. Article 25 provides that an airline responsible for wilful misconduct may not assert "the provisions of this convention which exclude or limit his liability . . ."

The majority found "that the drafters would not have considered Article 17 a 'limitation' on liability" under Article 25. *Id.* at 1489, A-26. In reaching this conclusion, the majority adopted the Second Circuit's decision in *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2d Cir. 1991) (*Lockerbie*).

Finally, the majority concluded that punitive damages were contrary to the Convention's goals because such awards "would increase the amount of litigation, the cost of insurance, and ultimately the price of air transportation." 932 F.2d at 1489, A-28.

The dissenting opinion on the punitive damage verdict. The dissent, noting the conflict among the circuits on the exclusivity issue, found that the Convention was not the sole cause of action for passengers injured on international flights: "Article 24's reference to 'any action for damages, however founded' clearly contemplates actions arising under separate sources of law . . .". *Id.* at 1492, A-33.

Thus, the dissent reasoned, plaintiffs could pursue their federal maritime law punitive damage claims, subject to the Convention's limitations. Since KAL committed wilful misconduct under Article 25, any Convention limitations—including the punitive damage bar read by the majority into the treaty—were inapplicable. *Id.* at 1494, A-37.

According to the dissent, "the history as well as the language of Article 25 supports the conclusion that punitive damages are not prohibited by the Warsaw Convention in cases of willful misconduct even if a cause of action based solely on the Convention would not authorize such damages." *Ibid.*

The dissent observed that the majority opinion relied heavily on the Second Circuit opinion in *Lockerbie*, but did not expressly adopt *Lockerbie*'s holding that the Convention was exclusive and preempted contrary law. *Id.* at 1493, A-35. The dissent concluded that "[i]f the court does not premise its holding on an exclusivity rationale, it must mean that Article

17 acts as a *limitation* on the liability that an air carrier would face when sued under separate causes of action. But then Article 25 would come into play and waive any such limitation in cases of wilful misconduct" *Ibid.*

The dissent further observed that the Warsaw Convention cannot preempt federal maritime law damages because both laws "stand in rough equipoise under the Supremacy Clause". *Ibid.*

Plaintiffs petition this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

There are two compelling grounds for this Court to grant certiorari and review the punitive damage decision below.

I. A conflict exists among circuit courts and state courts of last resort as to whether the Warsaw Treaty provides the exclusive cause of action for death or injury of a passenger in an international aviation accident and bars the application of other laws.

In barring the award of maritime law punitive damages, the majority below relied heavily upon the Second Circuit in *Lockerbie*. It held Warsaw established an exclusive cause of action without punitive recoveries, but the majority below declined to decide the exclusivity issue. The *Lockerbie* plaintiffs seek certiorari in a petition filed contemporaneously with this petition.

The Ninth Circuit on three occasions and Virginia's highest court have held that Warsaw allows causes of action under local law subject to the Convention's rules.⁴ Indeed, Article 24 provides that the treaty's monetary damage limit applies to "causes of action, *however founded*, . . ." whether based

4 *Johnson v. American Airlines* 834 F.2d 721 (9th Cir. 1987); *In re Mexico City Aircrash*, 708 F.2d 400 (9th Cir. 1982); *In re Air Crash in Bali, Indonesia*, 684 F.2d 1301 (9th Cir. 1982); *Sheris v. Sheris Co.*, 212 Va. 825, 188 S.E.2d 367, cert. denied, 409 U.S. 878 (1972).

on civil law contract, common law tort, or other applicable local precepts. (emphasis added). Warsaw's drafters expressly approved local law tort actions.

If Warsaw is not exclusive, then the verdict of maritime law punitive damages must be reinstated. Wilful misconduct found by the jury and unanimously affirmed below invokes Article 25 to nullify any liability exclusion and thus justify the punitive damage verdict.

This Court should determine whether the treaty permits a verdict awarding punitive damages under federal maritime law.

II. Certiorari should be granted because the majority below amended the Convention to overturn an established common law remedy contrary to recent decisions of this Court on punitive damages and Warsaw's interpretation.

The majority acknowledged that Warsaw does not mention punitive damages and in Article 24 expressly preserves local law remedies. Yet the court read the Convention as a civil law accord which implicitly barred punitive damages.

This Court, however, recently considered the common law as part of the treaty's diverse background.⁵ Common law nations with a long punitive damage tradition participated in drafting the Convention. No intent was ever expressed by Warsaw's framers to exclude punitive recoveries.

This Court has directed that existing common law remedies must be preserved absent clear and express treaty language.⁶ And four recent decisions of this Court have rejected claims that laws contain a tacit bar to punitive recoveries.⁷

5 *Eastern Airlines v. Floyd*, 111 S. Ct. 1489 (1991).

6 *Guaranty Trust v. United States*, 304 U.S. 126 (1938).

7 *Pacific Mutual v. Haslip*, 111 S. Ct. 1032 (1991); *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257 (1989); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984); *Smith v. Wade*, 461 U.S. 30 (1984).

In construing the treaty, this Court has observed that "where the text is clear . . . we have no power to insert an amendment."⁸ This Court should uphold Warsaw's plain terms and reinstate the award of maritime common law punitive damages.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND STATE COURTS OF LAST RESORT OVER WHETHER THE WARSAW CONVENTION TREATY CREATES AN EXCLUSIVE CAUSE OF ACTION

This Court should decide whether the Warsaw treaty creates an exclusive cause of action barring punitive damages.

On three occasions, the Ninth Circuit has held that the Convention is not exclusive and does not preempt, but allows local law causes of action subject to the Convention's rules. *Johnson v. American Airlines*, 834 F.2d 721, 723 (9th Cir. 1987); *In re Mexico City Aircrash*, 708 F.2d 400, 405 n. 25 (9th Cir. 1982); *In re Air Crash in Bali, Indonesia*, 684 F.2d 1301, 1311 n. 8 (9th Cir. 1982).⁹ The Supreme Court of Virginia has held "that the Warsaw Convention does not create an independent right of action but only a presumption of liability leaving it for local law to grant the right of action." *Sheris v. Sheris Co.*, 212 Va. 825, 188 S.E.2d 367, *cert. denied*, 409 U.S. 878 (1972).

8 *Chan v. Korean Air Lines*, 490 U.S. 122, 135 (1989).

9 Three district court decisions in the Eleventh Circuit, together with the district court reversed by *Lockerbie*, have held the Convention is not exclusive and permits state law causes of action. *Alvarez v. Aerovias Nacionales de Columbia*, 756 F.Supp. 550 (S.D.Fla. 1991); *Calderon v. Aerovias Nacionales de Columbia*, 738 F.Supp. 485 (S.D.Fla. 1990), *appeal dismissed*, 929 F.2d 599 (11th Cir. 1991); *In re Hijacking of Pan American Aircraft at Karachi*, 729 F.Supp. 17 (S.D.N.Y. 1990), *rev'd*, *Lockerbie*; *Rhymes v. Arrow Air*, 636 F.Supp. 737 (S.D.Fla. 1986).

The Second Circuit, Fifth Circuit and the Supreme Court of Alabama created the conflict by holding the Convention to be the exclusive cause of action and preempting local law. *Lockerbie*, 928 F.2d at 1270; *Boehringer-Mannheim Diagnostics v. Pan American World Airways*, 737 F.2d 456, 459 (5th Cir. 1984) (Convention exclusive and preempts recovery under Texas law), *cert. denied*, 469 U.S. 1186 (1985); *Newsome v. Trans International Airlines*, 492 So. 2d 592, 599 (Ala.) (Warsaw exclusive and preempts state common law causes of action), *cert. denied*, 479 U.S. 950 (1986).¹⁰

The exclusivity-preemption issue has been the source of successive contradictory decisions. Until 1978, the Second Circuit held that *no* cause of action was established by the treaty. See *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978) (overruling prior case law which required plaintiffs to base their cause of action outside the treaty), *cert. denied*, 439 U.S. 1114 (1979). The Second Circuit then ruled that Warsaw created a cause of action, but was not exclusive and allowed local law claims. *Ibid*; *Tokio Marine v. McDonnell Douglas*, 617 F.2d 936, 942 (2d Cir. 1980). Most recently, *Tokio Marine* was overruled by *Lockerbie*.

The majority below declared that "we need not take sides in the exclusivity debate." 932 F.2d at 1488, A-25. The court, however, applied the Convention as plaintiff's exclusive cause of action by ruling that the Warsaw's Article 17 "overrides" maritime law claims for punitive damages. *Ibid*.; Section II, *infra*.

Exclusivity was necessarily indispensable to the majority's opinion because Article 25 directs that an airline responsible for wilful misconduct "shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability"

10 A Florida federal district court has held that the Convention creates an exclusive cause of action. *Velasquez v. Aerovias Nacionales de Columbia*, 747 F.Supp. 670 (S.D. Fla. 1990).

If plaintiffs' federal maritime claims proceed subject to Warsaw, any treaty bar to punitive damages would "exclude or limit" KAL's liability. But KAL's wilful misconduct invokes Article 25 which denies KAL the benefit of such a bar. The Convention cannot nullify the jury's damage verdict unless Warsaw both denies punitive recoveries and preempts plaintiffs' federal maritime law actions.

The majority below held that Warsaw's ban on punitive damages was absolute and applied despite KAL's wilful misconduct. The court based its ruling on *Lockerbie*, which held that Article 17 created a passenger's sole cause of action and thus did not "exclude or limit . . . liability" under Article 25. 932 F.2d at 1489, A-26 ("we agree with the Second Circuit that the drafters would not have considered Article 17 a 'limitation' on liability."). As the dissent below observed:

The majority relies heavily on *Lockerbie* for the proposition that Article 25 does not trump Article 17, but there the court had taken exclusivity as its starting point. It is one thing to say that the Convention prohibits punitive damages because it is the sole available cause of action and does not provide for them; it is quite another to conclude that Article 17 acts as a limitation on damages restricting recovery under other causes of action that allow punitive damages. *Id.* at 1493, A-35 (dissent).

Federal maritime law and the Warsaw treaty share equal stature under the Constitution. U.S. Const. art. VI, cl. 2 ("the laws of the United States . . . and all treaties made . . . shall be the supreme law of the land . . ."); *Kossick v. United Fruit*, 365 U.S. 731, 739 (1961) (held federal maritime law is supreme under Article 6 of the Constitution). Maritime law allows for recovery of punitive damages in plaintiffs' survival claims under established common law principles. *Evich v. Morris*, 819 F.2d 256 (9th Cir.) ("punitive damages are available in a general maritime survival action . . ."), *cert. denied*, 484 U.S. 914 (1987); *In re Merry Shipping*, 650 F.2d 622 (5th Cir. 1981) ("punitive damages may be recovered

under general maritime law upon a showing of willful and wanton misconduct. . .").

The treaty preserved and did not preempt plaintiffs' maritime rights of action. Article 24 states that the Convention's limits and conditions apply to "any action for damages, *however founded*. . . ." (emphasis added). The Ninth Circuit observed that "[t]he best explanation for the wording of article 24(1) appears to be that the delegates did not intend . . . the cause of action created by the Convention to be exclusive" *In re Mexico City Aircrash*, 708 F.2d 400, 414 n. 25 (9th Cir. 1983).

The fundamental purpose of the Convention was to limit recovery in international airline accident cases to \$8,300 (Article 22), except when wilful misconduct is proved. Article 24 imposed that limitation on all causes of action, whether based on civil law contract, common law tort, local statutes, or whatever. *In re Air Crash in Bali, Indonesia*, 684 F.2d 1301, 1311 n. 8 (9th Cir. 1982) ("the Convention has never been read to *limit* plaintiffs to a cause of action arising thereunder, but rather to limit the recovery in suits for injury.").

No language in the treaty states or implies that the Convention prescribes the universal cause of action.

Warsaw's drafters openly discussed and agreed that the Convention permits local law tort actions. The chief United States' delegate to the 1955 Hague Convention reviewed the treaty's history, including the initial drafting conferences held in Paris and Madrid by the International Technical Committee of Legal Aeronautical Experts (CITEJA). He concluded:

There is nothing in the Convention which automatically makes the cause of action under Warsaw supercede all other causes of action

Not only is the implication from the drafting of Article 24 clear that the possibility of tort action was contemplated, but this point was specifically raised in the preliminary discussions held in Madrid by the Citeja.

There, during the debate on the draft text which ultimately became Article 24, the committee discussed the possibility of tort suits

[N]o attempt was made by the framers of the Convention to outlaw the right of a plaintiff . . . to bring an action in tort.

Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. Air. L & Com. 323, 327-8 (1959). Indeed, Warsaw's drafters attempted but failed to reach agreement on a single uniform cause of action. International Conference on Private Aviation Law (Paris 1926) ("[I]t is impossible to set in a single formula the various legal concepts of the various States . . .").

From Warsaw's inception, commentators have invariably agreed that the treaty is not exclusive. Drion, *Limitation of Liabilities in International Air Law* 135-6 (Martinus Nijhoff 1954) (Article 24 and its drafting history confirm that an action may be "founded on the contract or brought outside the contract as an action in tort . . ."); Matte, *Treatise on Air-Aeronautical Law* 382 (McGill University 1981), quoting *R.C. Ac. Haye*, Vol II, p. 285 (1934) (The Convention "set new bounds on an action in liability, boundary limits, but without regulating the essence itself."); Miller, *Liability in International Air Transport* 235 (Kluwer 1977) ("The phrase 'however founded' in Article 24(1) shows that the drafters of the Convention were aware that an action might be brought on several possible grounds.").

The decisions which decree that Warsaw is exclusive are bereft of supporting references to the treaty's text, drafting history and commentary.¹¹ 932 F.2d at 1492, A-34 (dissent).

11 Four commentators extensively cited in *Lockerbie*—Miller, Drion, Matte and Calkins—all conclude that the Convention is *not* exclusive. See p. 13, *supra*. And *Lockerbie* incorrectly states that "[t]he Ninth Circuit has . . . rebutted the idea that a cause of action may be

Instead, the rationale of "uniformity" was used by those courts to legislate an exclusive cause of action never contemplated by Warsaw's drafters. *Lockerbie*, 928 F.2d at 1275; *Boehringer-Mannheim*, 737 F.2d at 459.

A flood of additional federal court cases would follow from a denial of certiorari or affirmance. All minor Warsaw claims involving baggage, delay and injury would be vested with federal question jurisdiction irrespective of the amount of damages. 28 U.S.C. § 1331. And those same minor claims would be removable from state courts. 28 U.S.C. § 1441(b).

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW AMENDS THE CONVENTION TO UPSET AN ESTABLISHED COMMON LAW REMEDY CONTRARY TO THIS COURT'S DECISIONS ON PUNITIVE DAMAGES AND WARSAW'S INTERPRETATION

Certiorari should be granted because the majority below imposed a punitive damage bar contrary to the Convention, long-standing common law, and basic rules of treaty construction set down by this Court.

No Warsaw provision mentions punitive damages. The majority acknowledged that "the Convention does not address the issue of punitive damages . . ." 932 F.2d at 1485, A-20. Moreover, Article 24 provides that the Convention applied "without prejudice" to local damage laws and the "respective rights" of the plaintiffs.¹² The majority conceded that "pursuant to Article 24 the proper 'measure' of

founded on some law other than the Convention . . ." 928 F.2d at 1274. While *Lockerbie* cited *Mexico City Aircrash* as supporting authority, that decision along with other Ninth Circuit cases have clearly held that the Convention permits local law causes of action. *Mexico City Aircrash*, 708 F.2d at 405 n.25.

12 One noted commentator observed that under Article 24(2), "[t]he criteria for determining the categories of recoverable damages [under the Warsaw Convention] and the measure of damages vary greatly from country to country. . . ." Drion, *supra*, at 125-6.

damages recoverable under Article 17 is left to the domestic law of the contracting states . . .” 932 F.2d at 1488, A-25.

A punitive damage bar constitutes a judicial alteration of Warsaw contrary to this Court’s admonition in *Chan v. Korean Air Lines*, 490 U.S. 112 (1989), that “we must . . . be governed by the text [of the Warsaw Convention]. . .” and “where the text is clear . . . we have no power to insert an amendment.” *Id.* at 126-7.

This Court has ruled that a treaty may not overturn existing common law remedies absent clear and express language. *Guaranty Trust v. United States*, 304 U.S. 126, 143 (1938); see *Trans World Airlines v. Franklin Mint*, 466 U.S. 243, 252 (1984) (the treaty’s monetary damage limit could not be overturned in the face of “ambiguous congressional action” and “[l]egislative silence”); *Herd & Co. v. Krawill Machinery*, 359 U.S. 297, 304 (1959) (“No statute is to be construed as altering the common law, farther than its words import.”).

Four recent decisions of this Court upheld punitive damages as an integral common law tort remedy and reject claims that the Constitution or federal statutes contain a tacit bar on punitive awards. *Pacific Mutual v. Haslip*, 111 S. Ct. 1032 (1991) (Fourteenth Amendment of the Constitution); *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257 (1989) (Eighth Amendment of the Constitution); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984) (Atomic Energy Act); *Smith v. Wade*, 461 U.S. 30 (1983) (Civil Rights Act).

The majority below improperly read the treaty in the vacuum of a “civil law context”. 932 F.2d at 1487, A-24. This Court, however, recently held that common law tradition should be considered in interpreting the Warsaw Convention. *Eastern Airlines v. Floyd*, 111 S. Ct. 1489 (1991) (Court relied on “the unavailability of compensation for purely psychic injuries in many common and civil law countries at the time of the Warsaw Conference”). This Court has approved consideration of the *shared* expectations of the treaty’s civil and common law framers in construing the text, not whole-

sale adoption of civil law rules. *Air France v. Saks*, 470 U.S. 392, 399 (1985).

The treaty was drafted with common law participants England and Australia, with the United States present as an observer. This Court recognized that common law punitive damages were recoverable in England and Australia, along with the United States, for many years prior to and at the time of the 1929 Convention. *Pacific Mutual v. Haslip*, 111 S.Ct. at 1041-2, 1047 (Scalia, J., concurring) (common law punitive damages have existed in England and the United States for over two hundred years).

Given that the treaty was drafted to apply to common law signatories, it was unreasonable for the majority below to conclude from the treaty's silence on punitive damages that Warsaw's drafters intended a punitive bar.¹³

The majority held that Article 17's imposition of liability on airlines for "damages sustained" constituted an implicit exclusion of punitive recoveries. The Second and Eleventh Circuits reached the same conclusion. *Lockerbie*, 928 F.2d at 1282; *Floyd v. Eastern Airlines*, 872 F.2d 1462, 1487 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991).¹⁴

-13 The decision below restricts damage awards in common law nations but grants civil law plaintiffs all available remedies, including moral damages, which are based in part on the defendant's degree of fault. *Lockerbie*, 928 F.2d at 1282 (France and Germany allow fault based damages in injury and death cases).

Warsaw signatories Australia, Canada and the United States allow the recovery of common law punitive damages without limitation. *Browning-Ferris v. Kelco Disposal*, 492 U.S. at 273 n. 18, 278 n.24 (1989). In 1964, thirty-five years after the Warsaw Conference, England imposed restrictions on punitive damages, but did not completely bar recovery. *Ibid*.

14 Three district courts have held that the treaty bars punitive damages: *In re Disaster at Lockerbie, Scotland*, 733 F. Supp. 547 (E.D.N.Y. 1990), affirmed by the Second Circuit, together with *In re Air Crash at Gander, Newfoundland*, 684 F.Supp. 927 (W.D. Ky. 1987) and *Harpalani v. Air India*, 634 F.Supp. 797 (N.D. Ill. 1986). Three district courts have held that punitive damages are recoverable in treaty cases:

Article 17 affirmatively provides that "[t]he carrier shall be liable for damage sustained in the event of death. . . of a passenger. . ." Article 17 does not define recoverable damages, but merely established the conditions precedent which trigger an airline's liability. *Air France v. Saks*, 470 U.S. at 397 ("Article 17 establishes the liability of international air carriers for harm to passengers."); Miller, *supra*, at 125 ("Article 17 . . . did not purport to regulate the type of damage which could be compensated.").¹⁵

In the discussions at the Warsaw Conference and CITEJA meetings concerning Article 17 and its predecessor articles, there is no suggestion whatsoever that the treaty's drafters intended to eliminate existing rights of recovery or define damages. Second International Conference on Private Aeronautical Law Minutes 166-7, 255 (Warsaw, 1929) (R. Horner & D. Legrez trans. 1975).

In *Smith v. Wade*, 461 U.S. 30 (1983), this Court rejected similar arguments that the phrase "for redress" in 42 U.S.C. § 1983 "means that Congress intended to limit recovery to compensatory damages." *Id.* at 36 n. 5. This Court found such a construction was "strained" and ruled that punitive damages were recoverable under the statute. *Ibid.*

the district court below, reversed by the majority opinion, *In re Hijacking of Pan American Aircraft at Karachi*, 729 F. Supp. 17 (S.D.N.Y. 1990), reversed by *Lockerbie*, and *Hill v. United Airlines*, 550 F.Supp. 1048 (D. Kan. 1982).

- 15 These conditions are: the death, wounding or bodily injury to a passenger; an accident which caused the damage; and such accident taking place on board the aircraft or in the course of any of the operations of embarking or disembarking.

CONCLUSION

Certiorari should be granted to review the majority opinion below.

Respectfully submitted,

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APPENDIX

DECLARATION

On this day I have signed the following declaration:

My name is [Name]

My address is [Address]

My telephone number is [Number]

My occupation is [Occupation]

My date of birth is [Date]

My date of entry is [Date]

My date of departure is [Date]

My date of return is [Date]

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 25, 1991

Decided May 7, 1991

No. 89-5415

IN RE KOREAN AIR LINES DISASTER OF
SEPTEMBER 1, 1983,
KOREAN AIR LINES COMPANY, LTD.,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 83-0345)

George N. Tompkins, Jr., with whom *Desmond T. Barry, Jr.* was on the brief, for appellant.

Steven R. Pounian, with whom *Milton G. Sincoff*, *Donald W. Madole* and *George E. Farrell* were on the brief, for appellees, *Philomena Dooley* and 136 others. *Juanita M. Madole* also entered an appearance for appellees.

Irene M. Solet and *Robert S. Greenspan*, Attorneys, Department of Justice, entered appearances for the Federal appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Thomas J. McLaughlin and Mary Rose Hughes entered appearances for appellee The Boeing Company.

Before: MIKVA, *Chief Judge*, BUCKLEY and THOMAS, *Circuit Judges*.

Opinion for the court filed by *Chief Judge* MIKVA, except as to Part II(C).

Opinion for the court as to Part II(C) filed by *Circuit Judge* BUCKLEY.

Opinion dissenting in part filed by *Chief Judge* MIKVA.

MIKVA, *Chief Judge*: On September 1, 1983, a Korean Air Lines ("KAL") Boeing 747 airliner was shot down somewhere over the Sea of Japan by one of the Soviet Union's SU-15 interceptor aircraft, killing all 269 persons on board. The approximate crash site placed the flight more than 300 nautical miles off course and in Soviet airspace. Before trial, the district court granted summary judgment for the United States on claims that it had breached a duty to warn. See *In re Korean Air Lines Disaster of September 1, 1983*, 646 F. Supp. 30 (D.D.C. 1986). In an appeal brought by the unsuccessful plaintiffs in those cases, we upheld the district court's decision. See *Wyler, et al. v. Korean Air Lines, Inc., et al.*, No. 86-5400 (D.C. Cir. Mar. 29, 1991). Additional background on the disaster is provided in our opinion in the companion appeal.

In this case, KAL appeals from a judgment entered against it by the district court after a jury found KAL guilty of willful misconduct and awarded damages to a group of 137 plaintiffs; the award included \$50 million in punitive damages. KAL challenges both the willful misconduct verdict and the assessment of punitive damages. Although KAL raises some valid concerns about the quality of the evidence submitted to the jury, we conclude that the finding of willful misconduct was permissible. However, we vacate the punitive damage award.

I. BACKGROUND

On August 31, 1983, Korean Air Lines Flight 007 ("KE007") left New York's Kennedy Airport bound for Seoul, South Korea, with a stop in Anchorage, Alaska. After refueling there, KE007 took off from Anchorage International Airport at 1300 Greenwich Mean Time ("G.M.T."), or 4:00 a.m. local time. The Anchorage Air Traffic Control ("ATC") Center instructed KE007 to climb and maintain a flight level of 33,000 feet and "proceed direct BETHEL when able." BETHEL, located approximately 360 nautical miles west of Anchorage, is the navigational gateway for Route R20 of the North Pacific Composite Route System, which operates like a multi-lane highway for civilian flights across the Pacific Ocean between North America and Asia. BETHEL also serves as a navigational waypoint at which an airplane can cross-check its position against a radio fix. Route R20 has a series of navigational waypoints with precise geographical coordinates, each about 300 miles apart, that KE007 would follow on a direct path and use for course verification and reporting purposes. These waypoints were designated BETHEL, NABIE, NUKKS, NEEVA, NINNO, NIPPI, NYTIM, NOKKA and NOHO. See Map of the North Pacific (attached as an appendix to this opinion). Position reports from the crew to ATC ground controllers were required at BETHEL and other waypoints up through NIPPI, some 1800 miles from Anchorage. Anchorage ATC transfers control of aircraft following Route R20 to Tokyo Center at waypoint NIPPI.

At the time that these events took place, Anchorage ATC had radar coverage for less than half the distance to BETHEL. The Federal Aviation Administration's ("FAA") Kenai radar installation provided coverage as far as Cairn Mountain, approximately 165 nautical miles west of Anchorage. FAA radar surveillance was terminated at 1327:50 G.M.T. From that point on, Anchorage ATC would rely on the crew's position reports (calculated in-flight with the help of the waypoints and on-board systems) to track KE007's location and adherence to R20. At

1349 G.M.T., KE007's pilot reported reaching BETHEL and estimated that they would pass over their next reporting waypoint, NABIE, at 1430 G.M.T.

After BETHEL, KE007 did not have any direct communications with Anchorage ATC. During the remainder of the flight, the crew reported reaching each successive waypoint up to NIPPI, when Anchorage transferred control to Tokyo. These reports were relayed to Anchorage ATC by another KAL flight, KE015, which had departed Anchorage 14 minutes after KE007 and also was following Route R20. At NABIE, KE007 should have been able to communicate directly with Anchorage ATC through the St. Paul Island radio transmitter, but the crew was unable to do so, having instead to relay the report through KE015. KAL elicited testimony that this was not necessarily unusual and could be caused by weather. Plaintiffs countered that such a problem was rare, and they suggested that the direct broadcast was impossible because KE007 was already 90 miles off course at NABIE and out of the range of St. Paul Island's radio. This happened again at the next waypoint, NEEVA, where KE007 should have reported by using the Sheyma Island radio station. Evidently the pilot of KE015 became suspicious that something was wrong when KE007 requested that he relay this position report to Anchorage ATC, in part because KE007's time of arrival at that waypoint was nine minutes late and the explanation KE007's crew gave for the delayed arrival (strong headwinds) conflicted with his own observations just four minutes behind. Plaintiffs contended at trial that the inability to use the Sheyma Island radio station and the inconsistent headwind reports resulted from the fact that KE007 was now 170 miles off course and inside Soviet airspace.

After control of KE007 was transferred from Anchorage ATC, the crew reported to the controllers in Tokyo that they had reached NIPPI and estimated their time of arrival at NOKKA as 1826 G.M.T. A subsequent accident report concluded that the wind conditions reported by KE007 at NIPPI did not match those experienced on R20

and were more consistent with a position over 200 miles to the north-northwest over the Kamchatka Peninsula, U.S.S.R. The final direct transmission from the KE007 crew to ground controllers was a report to Tokyo at 1827:10 G.M.T. that the plane was rapidly decompressing and descending. The flight recorders and most of the wreckage were never recovered, so the details of what happened remain a mystery. However, contrary to KAL's suggestion, there was evidence from which to calculate an approximate crash site, including intermittent acoustic signals from an underwater flight recorder beacon received by search vessels in the area along with debris from the crash found in the Sea of Japan and washed ashore on Hokkaido Island.

Plaintiffs' liability claims in all of these actions grow from a hypothetical flight deviation that they claim was apparent on FAA radar shortly after take-off and could be extrapolated across the entire route to the approximate crash site in the Sea of Japan (after flying for about three hours in Soviet airspace and crossing over the Kamchatka Peninsula and Sakhalin Island). See Appendix. At trial, plaintiffs attempted to establish willful misconduct by the KE007 flight crew by theorizing that, due to an error in programming the Inertial Navigation System ("INS") prior to departure from Anchorage, KE007 deviated from its plotted course to Seoul and entered Soviet airspace. The INS is a navigational device which stores pre-programmed flight plans and displays data during the flight showing present position, waypoint positions, and any course deviations from the designated route. The INS units use gyroscopes to calculate positions during flight, and they must be programmed before takeoff by inserting the exact coordinates for latitude and longitude at the particular gate where the aircraft is parked.

At trial, plaintiffs contended that the crew must have known of the misprogramming either before leaving Anchorage or shortly thereafter, but decided to proceed rather than turn back and face possible disciplinary action such as suspension. Plaintiffs argue that the crew's loca-

tion reports were fabricated to cover up the error in programming. Furthermore, according to the plaintiffs, the crew must have been fully aware of the serious risk of straying into Soviet airspace, given that a similar KAL flight had been intercepted and forced down five years earlier. In 1978, KAL flight 902 had strayed deep into sensitive Soviet airspace near northern Europe, over 1000 miles off course. A Soviet fighter fired on the aircraft when it took evasive maneuvers, forcing an emergency landing on a frozen lake. This incident, which caused several fatalities, was evidently discussed in subsequent KAL training programs.

Plaintiffs' evidence consisted of radar reports covering the initial leg of KE007's flight, an investigative report completed by the Secretary General of the International Civil Aviation Organization ("ICAO") three months after the incident (hereinafter referred to as the "ICAO Report," although KAL emphasizes that it was never officially adopted by the ICAO Council), expert testimony from two pilots with extensive experience flying across the Pacific, and reports of prior unrelated incidents involving KAL navigation errors. At the close of plaintiffs' case, KAL moved unsuccessfully for a directed verdict. KAL then introduced the testimony of the air traffic controllers who monitored KE007 on radar and communicated with its crew, the testimony from the Deputy United States representative to ICAO and the report of the Air Navigation Commission ("ANC") of ICAO criticizing the Secretary General's Report. The jury returned a liability verdict against KAL, and in a subsequent verdict awarded plaintiffs \$50 million in punitive damages. The trial judge entered judgment on the verdict and denied KAL's motion for judgment notwithstanding the verdict ("JNOV").

II. ANALYSIS

On appeal, KAL argues (1) that there was insufficient evidence of willful misconduct to support the jury's verdict; (2) that several pieces of evidence used to prove will-

ful misconduct (the ICAO Report, the expert testimony based on that report, and the prior incidents) should not have been admitted; and (3) that the award of punitive damages was improper. We find merit in only the last of these contentions.

A. *Evidence of Willful Misconduct*

Initially, KAL contends that the district court's final jury instruction misstated the standard for willful misconduct. KAL requested a definition of willful misconduct as the "intentional performance of a wrongful act," but allegedly the court defined it only as the "intentional performance of an act." KAL has taken the actual instruction out of context:

Willful misconduct is the intentional performance of an act with knowledge that the act will probably result in an injury or damage, or in some manner as to imply reckless disregard of the consequences of its performance.

This is precisely the formulation approved by this court in *KLM Royal Dutch Airlines v. Tuller*, 292 F.2d 775, 778 (D.C. Cir.), *cert. denied*, 368 U.S. 921 (1968).

KAL's primary argument on appeal is that there was no evidence from which a reasonable jury could find willful misconduct. Both sides mischaracterize what evidence was adduced at trial and for what purposes. In view of what was actually presented to the jury, we conclude that the evidence was not so one-sided that KAL was entitled to a JNOV or new trial. *Cf. In re Korean Air Lines Disaster of September 1, 1983*, 704 F. Supp. 1135, 1136-51 (D.D.C. 1988) (hereinafter "*In re KAL Disaster*") (detailing how each piece of plaintiffs' evidence could fit into the puzzle and what permissible inferences a jury might draw therefrom). The hard evidence of what happened is sparse: Anchorage radar showed that KE007's initial flight path was generally in the direction of waypoint BETHEL (though plaintiffs introduced additional radar evidence of a deviation appearing at this early stage in the flight), and wreckage was discovered in the Sea of Japan

shortly after a distress call from the crew. Although the exact crash site was never established, KAL does not deny that KE007 must have strayed hundreds of miles off course to end up in or near the Sea of Japan. The question is at what point did the flight go off course and why. Plaintiffs' theory, based in part upon the inconclusive ICAO Report, posits that the deviation was caused by an initial INS programming error that caused KE007 to stray progressively further off course during the flight. KAL emphasizes the flimsiness of this explanation but fails to offer one of its own; it contends that KE007 was on course throughout the flight across the Pacific until, for some entirely mysterious reason, it veered dramatically off course after waypoint NIPPI.

KAL argues that the radio transmissions from KE007's crew at each waypoint verify that they remained on course along Route R20. Plaintiffs respond by pointing to suspicious circumstances such as KE007's inability to communicate directly with air traffic control in Anchorage (having instead to relay its reports through KE015), and reporting wind conditions that were inconsistent with those encountered by KE015. KAL replies that the communications and reported wind conditions were in no way unusual, adding that these items could not provide evidence of the supposed course deviation. But all that plaintiffs were trying to prove at this point was that the uncorroborated reports from the crew were not persuasive evidence of their being on course. Plaintiffs suggested that the crew had a motive to lie because they knew they would face suspension if they admitted their error and turned back. A jury could legitimately discount the accuracy of those reports, in which case KAL's version of the probable flight path would be at least as speculative as plaintiffs' extrapolation. Given this lacuna, and the undisputed fact that the airliner was shot down hundreds of miles off course, a jury *could* credit plaintiffs' coherent theory of what happened, derived from circumstantial evidence such as the early radar reports of a mild course deviation before BETHEL and the arguably inconsistent wind reports.

A critical element in plaintiffs' scenario is evidence that a course deviation was evident as early as waypoint BETHEL that grew progressively larger during the flight. The FAA radar showed that halfway between Anchorage and BETHEL, KE007 was six miles north (to the right) of what would have been a direct heading toward the first waypoint. Military radar data from the uncertified though apparently accurate King Salmon station showed that KE007 was 12 miles north of a direct heading shortly before reaching BETHEL. Plaintiffs' witnesses interpreted this evidence as indicating a drift off course, extrapolating it to suggest at least a 12 mile deviation by the time KE007 passed BETHEL (well outside the 1-2 mile margin of error allowed). KAL argues that KE007 could proceed toward BETHEL any way it wanted (the ATC course clearance for R20 only applied once it left the coast after BETHEL), and being six miles off the most direct path at the half-way point and 12 miles off just before BETHEL would not justify an extrapolation of a 12 mile deviation at BETHEL. But plaintiffs introduced testimony that the flight would have reappeared on radar if it had suddenly turned directly toward BETHEL. A jury could reasonably believe plaintiffs' explanation of a deviation at BETHEL rather than KAL's evidence to the contrary, see *In re KAL Disaster*, 704 F. Supp. at 1138, 1142, and then extrapolate that deviation across the entire flight to the approximate crash site, just as juries are normally permitted to draw conclusions from less than complete direct evidence of what happened. This is not simply a case where the district court let the jury choose, on the basis of mere speculation and conjecture, between hypothetical scenarios of what happened. Contrast *Siegel v. Mazda Motor Corp.*, 878 F.2d 435, 437-39 (D.C. Cir. 1989) ("When the record thus contains competing, unrebutted hypotheses consistent with driver error [rather than a mechanical defect in the transmission] . . . we can discern no basis upon which to say that any one of the possible explanations is "more probable" than the others.").

Contrary to KAL's suggestion, plaintiffs did not simply use the flight path postulated by the ICAO Report and

based on the Soviet version of the intercept. Even if this aspect of the ICAO Report was arguably unreliable, a jury could make its own evaluation based upon the evidence supplied by plaintiffs and then accept the ICAO conclusions of possible causes drawn from the assumed flight path. Once the jury accepted plaintiffs' extrapolated path, the question becomes why the crew did nothing to correct the error. Because the flight recorder was never recovered, we only know that the crew claimed throughout the flight that they were on course. As explained above, plaintiffs discount these reports as fabrications. Plaintiffs' experts testified that, assuming the course deviation posited by plaintiffs, the deviation was probably the result of an error in programming the INS. The ICAO Secretary General reached the same tentative conclusion in his report. Moreover, plaintiffs' experts testified that the crew would have known of the deviation or, if they did not, that their ignorance was due to gross negligence in failing to check their instruments. (The jury was also informed that the ICAO Report concluded that the crew probably would not have been aware of the error.) Plaintiffs then introduced evidence of a 1978 Soviet intercept of a KAL flight to prove that this crew would have known of the hazards of straying into Soviet airspace.

Appellees add that even if one believed KAL's claim that KE007 stayed on course up to waypoint NIPPI, the flight must have then turned suddenly in the direction of Sakhalin Island to reach the crash site. KAL responds that if this were the correct scenario, there would be no basis for a finding of willful misconduct. However, the crew could not have failed to notice such a glaring deviation, and their failure to notify ATC until after they were decompressing suggests willful misconduct. Appellees are not using this as a fallback scenario so much as they are emphasizing KAL's inability to suggest any innocent explanation for the disaster. Admittedly, plaintiffs' case at trial did not include any "smoking guns," but that is because no one knows exactly what happened. There was sufficient evidence here from which to decipher a pattern

of conduct giving rise to liability. If the only evidence for the proposed course deviation had been the wreckage in the Sea of Japan, plaintiffs could not have prevailed simply by drawing a straight line from Anchorage and arguing that the crew would have known of this course deviation but chose to cover it up. Here there was additional, albeit not uncontroverted, evidence that a course deviation appeared almost immediately after take-off, consistent with a 10 degree error in setting the INS longitude coordinate at Anchorage, combined with somewhat suspicious radio reports from the crew. When "questions [of willful misconduct] depend upon inferences to be drawn from essentially circumstantial evidence . . . [o]ne can hardly imagine a clearer case in which such questions should have been left to the jury." *Berner v. British Commonwealth Pacific Airlines*, 346 F.2d 532, 538 (2d Cir. 1965) (reversing JNOV for plaintiffs in an air crash case), *cert. denied*, 382 U.S. 983 (1966).

B. Evidentiary Rulings

1. *The ICAO Report and Plaintiffs' Expert Testimony*

KAL objects to the introduction of the ICAO Report (and the appended Soviet intercept report), contending that it was hearsay not within the public records exception of Rule 803(8), FED. R. EVID. That rule provides, in pertinent part, that the following are not hearsay:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(8)(C). "Rule 803(8)(C) is to be applied in a commonsense manner, subject to the district court's sound exercise of discretion . . ." *City of New York v. Pullman Inc.*, 662 F.2d 910, 914 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982). KAL argues that there were no "factual findings" because the final report from the Secretary General — criticized for lacking hard evidence from

which to draw its conclusions — was never adopted by the ICAO Council. KAL also contends that the sources of the Report's information concerning the probable flight path, especially the so-called "Russian line" provided in the Soviet intercept report, lacked trustworthiness. Finally, KAL argues that admission of the ICAO Report contravened Rule 403, FED. R. EVID., because the jury was misled into believing that the conclusions were authoritative.

We disagree with KAL's characterization of the Report as non-final. By a special resolution passed a few weeks after the disaster, the ICAO Council directed "the Secretary General to institute an investigation . . . and to provide an interim report to the Council within 30 days . . . and a complete report during the 110th Session of the Council." After first giving the Council an interim report as required by the resolution, the Secretary General ultimately provided his "final report" to the Council, although he qualified it by conceding that the report was based on incomplete evidence and promising to supplement the Report if any new information came to light. The minutes of the Council session indicate the submission of the Secretary General's "final report" on December 12, 1983. The Council had the power to endorse or ignore the Report but apparently not revise it. *Cf. New York v. Pullman*, 662 F.2d at 914 ("As an interim report subject to revision and review, the report did not satisfy the express requirement of the Rule that the proffered evidence must constitute the 'findings' of an agency or official."). After sending the Report to the Air Navigation Commission for review and comment to determine whether any changes should be made in ICAO's Rules of the Air in light of the incident, the Council chose not to endorse it. Even so, the Secretary General was acting in the capacity of a public official when he conducted "an investigation made pursuant to authority granted by law" (in this case, the special resolution) and issued his final report. *Cf. In re Multi-Piece Rims Prods. Liab. Lit.*, 545 F. Supp. 149, 151 (W.D. Mo. 1982) (admitting letters from NHTSA employee acting in an official capacity and describing evaluative tests).

We are somewhat more troubled, however, with the district court's resolution of the trustworthiness question under Rule 803(8)(C). Although the ICAO Report was based on very limited hard evidence, this alone would not undermine its finality or trustworthiness. See *Beech Aircraft v. Rainey*, 488 U.S. 153, 168 (1988) (upholding the "broad admissibility" of facts, conclusions, evaluations and opinions contained in an aircraft accident report, because "the admission of a report containing 'conclusions' is subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions"). In this case, the district court let KAL introduce the ANC report criticizing the Secretary General's report. But KAL's trustworthiness objection focuses on the Preliminary Soviet Report appended to the ICAO Report and the Secretary General's use of the uncorroborated "Russian line" in arriving at his conclusions. Among other problems with the Soviet report, KAL claims that it was politically motivated, seeking to exonerate the Soviet Union's actions. Standing alone, we doubt that the Soviet report would have been admissible under Rule 803(8)(C), but its inclusion as an appendix to the ICAO Report would not automatically render the Secretary General's otherwise admissible report objectionable. See *FAA v. Landy*, 705 F.2d 624, 633 (2d Cir.) ("As a statement by a foreign government to the federal government, incorporated in the FAA's factual findings resulting from an investigation made pursuant to authority granted by law, the [German] telex was admissible as a public record and report under Fed.R.Evid. 803(8)(C)."), *cert. denied*, 464 U.S. 895 (1983).

The more difficult question is whether the alleged untrustworthiness of the Soviet report renders the ICAO Report inadmissible on those same grounds, at least those portions based in part on the Russian intercept line. Rule 803(8)(C) "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." FED. R. EVID. 803 advisory committee note. "The burden is on the party disputing admissibility

to prove the factual finding to be untrustworthy." *United States v. American Tel. & Tel. Co.*, 498 F. Supp. 353, 364 (D.D.C. 1980); accord *In re Aircrash in Bali, Indonesia*, 871 F.2d 812, 816 (9th Cir.), cert. denied, 110 S. Ct. 277 (1989). In *Rainey*, the Supreme Court observed that "a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof . . . that she determines to be untrustworthy." 488 U.S. at 167. While the Soviet report may have been particularly untrustworthy in its rendition of the actual intercept (indeed, in a recent interview with *Izvestia*, the Soviet pilot responsible for the shootdown disputed the sanitized official version, see *Wash. Post*, Jan. 25, 1991, at A16), the radar track itself was generally believed by several sources, including the United States government. At a news briefing on the day of the incident, the Secretary of State told reporters that KE007 "strayed into Soviet airspace over the Kamchatka Peninsula" and was tracked by the Soviets "for some 2-1/2 hours."

The district court clearly understood its duty to make a threshold trustworthiness finding and recognized its power to exclude any portions of the Report it felt were untrustworthy. KAL's counsel effectively conceded that the factual section of the ICAO Report (contained in the first 35 pages) was admissible. The district court initially decided not to admit one section of the ICAO Report discussing the Russian intercept line, but then let even that part in when KAL's counsel retracted his initial objection to the section standing alone. The district court decided that KAL's trustworthiness objections were more properly addressed to the jury for purposes of evaluating the weight to be accorded the Secretary General's conclusions: "[Y]ou might convince the jury that it is not worth the paper it is written on, but I am not going to throw the whole report out just because they might believe that in this particular case." Not surprisingly, the transcript of the district court's decision from the bench lacks the clarity of a written opinion. In hindsight, we would rather the court had made explicit preliminary findings, preferably

in limine, as to the trustworthiness of each challenged portion of the ICAO Report. But mindful that the burden was and is on KAL, we are not convinced that the court failed to carry through on its duties under Rules 104(a) and 803(8) or abused its discretion when it admitted the ICAO Report in its entirety.

Furthermore, as explained previously, plaintiffs did not rely on the Secretary General's report (or the Soviet intercept report) to establish the probable flight path. Instead, once the jury accepted plaintiffs' extrapolation, the ICAO Report helped fill the causation gap by evaluating the likelihood that an INS programming error was at fault. Indeed, even the ANC Report that KAL introduced to criticize the ICAO Report confirmed that there was a "significant deviation from track" that could not be explained. The danger, of course, is that the jury was also presented with the ICAO Report's working assumption based on the Russian line, and this may well have influenced their willingness to believe plaintiffs' extrapolation. Even so, this is precisely the sort of judgment call by the trial judge that is entitled to deference on appeal and will not be disturbed absent clear error. See *United States v. Payne*, 805 F.2d 1062, 1066-67 (D.C. Cir. 1986) (*per curiam*). The district court did not abuse its discretion under Rules 803(8)(C) and 403.

Finally, KAL criticizes the admission of testimony by plaintiffs' experts, again because of the supposed lack of any basis, other than the ICAO and Soviet reports, for the assumed deviation from which all their opinions sprang. Appellees respond that both experts were qualified pilots with significant trans-Pacific experience, and that the ICAO Report was a legitimate source for them to rely on. Because we have decided that the ICAO Report was properly admitted, the expert testimony is also unobjectionable.

2. *Evidence of Prior Incidents*

Plaintiffs introduced evidence of prior KAL incidents to suggest that the crew knew they risked suspension if

they returned to Anchorage for reprogramming, and that the crew was aware of the hazards of straying into Soviet airspace. KAL objects that evidence of these prior incidents was irrelevant and unduly prejudicial. Rule 404(b), FED. R. EVID., allows the admission of evidence concerning "prior bad acts" in limited circumstances, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." It is of course true that a prior incident must be sufficiently similar to be probative of intent or motive in relation to the incident at issue. See, e.g., *Edwards v. Consolidated Rail Corp.*, 567 F. Supp. 1087, 1105-06 (D.D.C. 1983), *aff'd mem.*, 733 F.2d 966 (D.C. Cir.), *cert. denied*, 469 U.S. 883 (1984).

In this case, plaintiffs sought to demonstrate through circumstantial evidence what the crew of KE007 knew or should have known about the consequences of their conduct and also to rebut KAL's suggestion that misprogramming was impossible or correctable en route. These are permissible ends that do not require the exacting degree of similarity that would be necessary when using prior bad acts to prove specific intent or motive. See *Exum v. General Elec. Co.*, 819 F.2d 1158, 1162-63 (D.C. Cir. 1987) ("How substantial the similarity must be is in part a function of the proponent's theory of proof," and a theory of notice "imposes a less rigorous requirement of similarity.").

KAL asserts that it never claimed misprogramming was impossible or that crews did not know about the hazards of intruding Soviet airspace. Neither statement is entirely correct. While the evidence of these prior incidents was no doubt somewhat prejudicial, plaintiffs appear to have introduced it for permissible purposes. See, e.g., *United States v. Payne*, 805 F.2d at 1066-67. Knowledge (not specific intent or motive) was a relevant issue, notwithstanding KAL's mild concession in opening argument that the crew would have known of the dangers of flying into Soviet airspace. If KAL wanted to remove the issue from trial so as to exclude evidence of the 1978 shootdown, a

pre-trial stipulation might have done the trick. In fact, before trial KAL was arguing that the intercept was an unforeseeable, superseding cause of the disaster, a claim the court felt had to be left to the jury. *See In re KAL Disaster*, 704 F. Supp. at 1149 & n.37. We conclude that the evidence of prior incidents was properly admitted at trial.

C. Punitive Damages

BUCKLEY, *Circuit Judge*: These consolidated wrongful death actions are governed by the terms of the Warsaw Convention, a multilateral treaty to which the United States has adhered since 1934. See Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, Article 1(1), 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. app. § 1502 note (1988). Relying on *Floyd v. Eastern Airlines*, 872 F.2d 1462, 1483-89 (11th Cir. 1989) ("*Floyd I*"), *rev'd on other grounds*, 59 U.S.L.W. 4307 (U.S. Apr. 17, 1991), KAL argues that the Convention disallows awards of punitive damages and that the district court therefore erred in submitting the issue to the jury. KAL's position was recently adopted by the Second Circuit in *In re Air Disaster at Lockerbie, Scotland*, on Dec. 21, 1988, No. 90-7388, slip op. 2927 (2d Cir. Mar. 22, 1991) ("*Lockerbie*").

Plaintiffs maintain that punitive damages are permitted whenever they are available under applicable local law and, in any event, should be recoverable once it is shown that the carrier acted with willful misconduct. For the reasons that follow, we agree with KAL and our sister circuits; hence, we set aside the jury's award of punitive damages.

The Warsaw Convention establishes the liability of international air carriers for harm to passengers, baggage, or goods; fixes limitations on such liability; and achieves a degree of uniformity in documentation and in the procedures and substantive law applicable to claims arising out of international air carriage. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-500 (1967). The central purpose of the Convention is to limit the liability of air carriers. The contracting states in 1929 believed that limitations on liability would promote the development of the fledgling commercial air industry by allowing the airlines to predict their exposure to monetary damages and thereby obtain needed capital and adequate insurance coverage.

See *Eastern Airlines v. Floyd*, 59 U.S.L.W. 4307, 4312 (U.S. Apr. 17, 1991) ("*Floyd II*"); *Lockerbie*, slip op. at 2934; *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), cert. denied, 434 U.S. 922 (1977); *Lewenfeld & Mendelsohn*, *supra*, 80 Harv. L. Rev. at 498-500.

Article 17 of the Convention defines a carrier's liability for harm to passengers. See *Air France v. Saks*, 470 U.S. 392, 397 (1985). Article 17 provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 24 allows contracting states to decide the standing and "respective rights" of claimants who seek recovery under Article 17, provided that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Under Article 25, a carrier "shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability" when it is shown that the damage suffered by the claimant was caused by the carrier's "willful misconduct," as defined by the law of the forum court.

Under the Convention as originally ratified, Article 22(1) limited the carrier's Article 17 liability to approximately \$8,300, and Article 20(1) allowed the carrier to avoid liability altogether by proving that it acted with due care. See *Floyd I*, 872 F.2d at 1467. With respect to flights to or from the United States, these provisions were superseded by the Montreal Agreement, an agreement among air carriers executed in 1966 and approved by the Civil Aeronautics Board pursuant to its authority under the Federal Aviation Act of 1958. In the Montreal Agreement, air carriers raised the per passenger liability limit to \$75,000 and assumed virtual strict liability for death or injury of passengers by waiving their due care defenses under Article 20(1). See Order of Civil Aeronautics Board

Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, May 13, 1966 (approving Agreement CAB 18900), 31 Fed. Reg. 7302 (1966), reprinted in 49 U.S.C. app. § 1502 note. KAL has been a party to the Montreal Agreement since 1969. See *Chan v. Korean Air Lines*, 490 U.S. 122, 124 (1989).

Whether punitive damages are allowable in actions governed by the Warsaw Convention must, in our opinion, turn on the nature of the liability contemplated by Article 17. The Convention sets forth an international liability scheme that was intended to be uniform. See *Lockerbie*, slip op. at 2956-57; *Floyd I*, 872 F.2d at 1488. We must honor this uniformity by "giv[ing] the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399. If a recovery is inconsistent with the shared expectations underlying Article 17, it is precluded. See *Lockerbie*, slip op. at 2961-62; *Floyd I*, 872 F.2d at 1487. Cf. *Floyd II*, 59 U.S.L.W. at 4309, 4311 (term "bodily injury" in Article 17 excludes recovery for purely mental injuries); *Saks*, 470 U.S. at 405 ("accident" requirement precludes liability under Article 17 unless injury caused by unexpected or unusual event external to passenger).

Although the Convention does not address the issue of punitive damages, the Article 17 phrase "liable for damage sustained" strongly implies that the carrier's responsibility is compensatory and extends only to the reparation of loss resulting from the death or injury of passengers. See *Floyd I*, 872 F.2d at 1483, 1486; *In re Air Crash Disaster at Gander, Newfoundland*, 684 F. Supp. 927, 931 (W.D. Ky. 1987) ("*Gander*"). The words "damage sustained" do not refer to legal damages; they refer to actual harm experienced, whether physical injury to the passenger or, in the case of death, monetary or other loss to his survivors. See *Lockerbie*, slip op. at 2959; see also Calkins, *The Cause of Action Under the Warsaw Convention* (pt. 2), 26 J. Air L. & Com. 323, 335 (1959). Article 17 does not specify that the damage must be sustained "by the passenger" and thus allows for the possibility of traditional wrongful death

actions. The requirement that the damage "so sustained" be "caused" by an accident on board the aircraft, however, reenforces the conclusion that recovery is available only for actual loss; an accident cannot "cause" punitive damages. *Lockerbie*, slip op. at 2959-60.

French is the controlling language of the Convention. See Article 36; *Floyd II*, 59 U.S.L.W. at 4309; *Saks*, 470 U.S. at 397. The relevant phrase in French is "*dommage survenu*." The parties have not suggested that this phrase carries any special meaning in French law, and we are satisfied that "damage sustained" in the official American version of Article 17 — the version ratified by the Senate in 1934 — is an accurate translation of "*dommage survenu*." See *Lockerbie*, slip op. at 2958-59; *Floyd I*, 872 F.2d at 1486-87; *Gander*, 684 F. Supp. at 931.

The wording of Article 17 thus describes liability for compensatory or actual damages — that is, damages that "will compensate the injured party for the injury sustained . . . [or] will simply make good or replace the loss caused by the wrong or injury." *Black's Law Dictionary* 352 (5th ed. 1979). In contrast, punitive damages are recognized by federal courts as retributive and deterrent in nature. See *Lockerbie*, slip op. at 2937-38; *Floyd I*, 872 F.2d at 1487. They "are not compensation for injury," but rather are awarded "to punish reprehensible conduct and to deter its future occurrence." *IBEW v. Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). "Their role therefore 'runs counter to the normal reparative function of tort and contract remedies.'" *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2932 (1989) (O'Connor, J., concurring in part and dissenting in part) (quoting K. Redden, *Punitive Damages* § 2.1, at 24 (1980)). The purposes served by punitive damages are incompatible with the liability scheme set forth in Article 17. See *Floyd I*, 872 F.2d at 1487.

In *Lockerbie*, the Second Circuit pointed out that a minority of state courts in the United States view punitive

or exemplary damages as serving, at least in part, a "compensatory" function. *Lockerbie*, slip op. at 2938-39. The court concluded, however, that the Warsaw Convention preempts all state-law causes of action; otherwise, the uniform application of the Convention would be disrupted by the uneven patchwork of state punitive damages theories (a potential problem in diversity suits arising in states that adhere to the minority view). *See id.* at 2944-52. We need not reach this preemption question because plaintiffs here base their claim to punitive damages solely on federal maritime law. *See* Brief for Appellees at 29, 35-36.

Our construction of the Convention does not end with a word-by-word parsing of Article 17. We may properly look to the larger context of the Convention and its history, including the negotiations of its drafters and the interpretations given it by contracting states. *See Floyd II*, 59 U.S.L.W. at 4309; *Saks*, 470 U.S. at 396-97. In doing so, we must interpret and apply the terms of Article 17 in accordance with their French legal meaning because the Convention was drafted in French by civil law jurists. *Floyd II*, 59 U.S.L.W. at 4309; *Saks*, 470 U.S. at 399; *see Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

Nothing in the minutes and notes of the Convention's drafters indicates that the contracting parties ever considered the concept of punitive or deterrent damages for passengers' deaths. *See Lockerbie*, slip op. at 2958; *Floyd I*, 872 F.2d at 1487. The drafting history does indicate, however, that the drafters intended the carrier's liability to be contractual in nature. *See Second International Conference on Private Aeronautical Law: Minutes (Warsaw 1929)*, at 22 (R. Horner & D. Legrez trans. 1975) ("Warsaw Minutes") ("The system of liability of the Convention is based only upon the document of carriage.") (statement of Henri De Vos, reporter).

The kinds of damages available in French civil actions founded on contract parallel the compensatory forms of monetary recovery available in American tort suits. *See*

Lockerbie, slip op. at 2954-56, 2960. One commentator has observed, "There is nothing in French law prohibiting compensation for any particular kind of damage, be it mental injury, suffering due to the death of a member of the family, or pain and suffering due to a physical injury. Provided the damage is *certain* and *direct*, all forms of damage can be compensated to their full extent." G. Miller, *Liability in International Air Transport* 112 (1977) (emphasis in original) (footnote omitted). The French concept of *dommage matériel* provides compensation for pecuniary loss resulting from death or injury; *dommage moral* is roughly equivalent to compensatory damages for nonpecuniary loss, such as pain and suffering. See R. Mankiewicz, *The Liability Regime of the International Air Carrier* 157 (1981); G. Miller, *supra*, at 112-14.

These notions of recoverable damages are compensatory and not punitive in character. The same can be said of the kinds of recovery afforded by other civil law contracting states, such as Germany. See *Lockerbie*, slip op. at 2960-61. The Warsaw Convention practice of the principal common law contracting party, Great Britain, is consistent with this understanding. Although English courts in tort contexts do permit punitive damages in "unique and rare circumstances," *id.* at 2961 (citing *Rookes v. Barnard*, [1964] 1 All E.R. 367, 410 (H.L.) (Lord Devlin)), they have construed "*dommage*" in Article 17 to encompass only "monetary loss." See *id.* at 2959 (citing *Fothergill v. Monarch Airlines Ltd.*, [1981] App. Cas. 251, [1980] 2 All E.R. 696, [1980] 2 Lloyd's Rep. 295, 299 (H.L.) (Lord Wilberforce)). We conclude, therefore, that a monetary liability that is punitive and does not compensate for loss suffered would be contrary to the expectations of the jurists who drafted Article 17 and the contracting states that adopted it.

This conclusion comports with our obligation to construe the Convention in a manner that will promote uniformity. See *Floyd II*, 59 U.S.L.W. at 4313. The uniform application of the treaty would be threatened if the United States, alone among contracting states, imposed

a form of liability wholly outside the compensatory scheme of Article 17. See *Lockerbie*, slip op. at 2974-75; *Floyd I*, 872 F.2d at 1487-88. Undoubtedly, punitive liability for international carriers "would be controversial for most signatories," and we should construe the Convention to avoid such a "potential source of divergence." *Floyd II*, 59 U.S.L.W. at 4313.

In challenging our reading of "damage sustained," plaintiffs rely on *Smith v. Wade*, 461 U.S. 30, 36 n.5 (1983), in which the Supreme Court dismissed the argument that the phrase "for redress" in 42 U.S.C. § 1983 precludes recovery of punitive damages. *Smith* only confirms our analysis. In addition to noting that the tort cause of action created by section 1983 is expansive, 461 U.S. at 36 n.5, the Court relied on the common law context in which Congress enacted section 1983, a context in which punitive damages were a well-established tort remedy. See *id.* at 35, 37 n.5. Cf. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (federal regulation of nuclear plant safety does not preempt punitive damages award because "Congress assumed that traditional principles of state tort law would apply with full force unless . . . expressly supplanted"). Similarly, we may infer from its civil law context that Article 17 does not contemplate the award of punitive damages.

Plaintiffs argue that Article 24's references to actions for damages "however founded" and to claimants' "respective rights" make the availability of punitive damages a matter of local law. But Article 24 requires that any action for damages within the scope of the Convention satisfy the Convention's "conditions and limits." This requirement ensures the uniform application of the Convention. See N. Matte, *Treatise on Air-Aeronautical Law* 419 (1981). The most natural reading of the treaty is that the terms of liability established by Article 17 are among the "conditions" enforced by Article 24. See Calkins, *supra*, 26 J. Air L. & Com. at 327 ("conditions and limits" language in Article 24 designed "to protect the Convention cause of action," *i.e.*, Article 17); see also G. Miller,

supra, at 125 ("What Article 17 does is to determine the conditions under which an air carrier shall be liable."); *Floyd II*, 59 U.S.L.W. at 4308. Thus, Article 24 provides a clear textual basis for concluding that the Convention overrides liability awards that are inconsistent with Article 17.

Some courts and commentators have concluded that Article 24 preserves independent domestic causes of action based on tort law. *See, e.g., In re Aircrash in Bali, Indonesia*, on Apr. 22, 1974, 684 F.2d 1301, 1311 n.8 (9th Cir. 1982); Calkins, *supra*, at 327. Others disagree, taking the view that the Convention, when applicable, provides the exclusive cause of action. *See, e.g., Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways*, 737 F.2d 456, 458 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985). *See also Floyd I*, 872 F.2d at 1482 n.33 (discussing cases). In deciding only that punitive damages are contrary to the Convention, we need not take sides in the exclusivity debate.

Regardless of their views on independent causes of action, most authorities agree that pursuant to Article 24 the proper "measure" of damages recoverable under Article 17 is left to the domestic law of the contracting states. *See Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987); *Mertens v. Flying Tiger Line*, 341 F.2d 851, 858 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); R. Man-
kiewicz, *supra*, at 189; H. Drion, *Limitation of Liabilities in International Air Law* 125-26 (1954). This fact, however, begs the question whether such damages may be more than compensatory.

We think it evident they may not. In reporting the preliminary draft of the proposed treaty to the national delegates at Warsaw, the International Technical Committee of Air Law Experts ("CITEJA") stated:

The question was asked . . . if one could determine who the persons upon whom the action devolves in the case of death are, and what are the damages subject to *reparation*. It was not possible to find a satis-

factory solution to this double problem, and the CITEJA esteemed that this question of private international law should be regulated independantly [sic] from the present Convention.

Warsaw Minutes at 255 (emphasis added). The reporter's use of the word "reparation" bolsters our reading of Article 17 and "tends to exclude the concept of punitive damages." *Lockerbie*, slip op. at 2967.

Moreover, the drafting history shows that the CITEJA's inability to formulate a single rule for calculating damages resulted from the difficulty of choosing among widely varying national laws of descent and distribution governing who could sue on a decedent's behalf in wrongful death actions and who could sue only for personal loss. See *id.* at 2964-67; see also Calkins, *supra*, at 327-28 (discussing excerpts of drafting record). This inability does not suggest that the drafters ever contemplated the possibility of imposing liability that goes beyond compensation for loss, however determined. *Lockerbie*, slip op. at 2967.

Nor does a finding of willful misconduct under Article 25 create a right to recover punitive damages. Article 25 bars the carrier from relying on those provisions in the Convention that "exclude or limit" liability. Article 17 is not among these. It is settled that willful misconduct negates the due care exclusion from liability contained in Article 20 and the monetary limitations contained in Article 22. See *Lockerbie*, slip op. at 2971; *Grey v. American Airlines*, 227 F.2d 282, 285 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956). Disagreement about whether other provisions are affected, see H. Drion, *supra*, at 80 n.5 (citing authorities), does not obscure the fact that certain key articles in the Convention continue to apply in cases of willful misconduct, and no authority suggests that the basic liability terms of Article 17 (or any of the other "conditions" preserved by Article 24) were to be displaced. See *Lockerbie*, slip op. at 2971-72. Given the drafting context discussed above, we agree with the Second Circuit that the drafters would not have considered Article 17 a "limitation" on liability. See *id.* at 2972. In sum, Article

25 is "most reasonably interpreted as [an] exception[] to the limitations on the recovery of *compensatory* damages within the Convention, not as authority for the recovery of *punitive* damages." *Gander*, 684 F. Supp. at 932 (emphasis in original); *accord Floyd I*, 872 F.2d at 1484.

The Hague Protocol of 1955 and the Montreal Protocol No. 4 of 1975 provide further confirmation. These Protocols, among other things, clarified Article 25 to make it explicit that the limits on liability lifted in the event of willful misconduct are only the monetary limits contained in Article 22. *See Floyd I*, 872 F.2d at 1483-84 & n.35. The United States has not ratified the Hague or Montreal Protocols and they are not binding on us, but we may look to them for clarification of the Convention's terms. *Id.* at 1484 n.35; *see Saks*, 470 U.S. at 403-04 ("subsequent interpretations of the signatories help[] clarify the meaning" of terms (referring to history of unratified Protocols)); *see also Floyd II*, 59 U.S.L.W. at 4312. As the dissent points out, the Hague Protocol did more than clarify Article 25; it also "narrow[ed] the waiver of limitations in cases of willful misconduct." Dissenting Op. 7. It did so by adopting a new treaty definition of willful misconduct that supplanted Article 25's reference to forum law. *See Lowenfeld & Mendelsohn, supra*, 80 Harv. L. Rev. at 503-06. But that substantive amendment does not belie the view that the Protocol's specific reference to the monetary limits of Article 22 was understood only to be a clarification. *See Floyd I*, 872 F.2d at 1483.

The policies underlying the Convention support our conclusions. The Convention represented a bargain between air carriers on the one hand and passengers and shippers on the other. Carriers obviously gained from the limitations on liability agreed to by the contracting states, but passengers and shippers also benefited, primarily from the Convention's clear presumption of liability, which eliminated the difficult task of proving fault on the part of the carrier. Furthermore, under the law of contract as it existed prior to the Convention, the carrier could essen-

tially avoid liability for harm resulting from the often hazardous business of air transportation:

[I]n reality, this Convention creates against the air carrier an exceptional system, because in the majority of the countries of the world, contracts of carriage are concluded under a system of free contract. The carrier is free to insert in the contract clauses which exclude or reduce his liability, as much for goods as for travelers. You are of course aware that they have lost no opportunity to do so, and presently many air carriers operate under this unregulated contractual system, and, in practice, in fact, they are not liable.

Warsaw Minutes at 47 (statement of Georges Ripert of France).

The essential bargain struck by the contracting parties in Warsaw was presented to the United States Senate as a principal reason for ratifying the Convention:

It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules Relating to International Transportation by Air, Sen. Exec. Doc. G, 73d Cong., 2d Sess. 3-4 (1934) (Report of Secretary of State Cordell Hull). The award of punitive damages would be contrary to this essential bargain because it would increase the amount of litigation, the cost of insurance, and ultimately the price of air transportation. See

Lockerbie, slip op. at 2975-77; *Floyd I*, 872 F.2d at 1487-88.

Our dissenting colleague suggests that our reading of the Convention will leave undeterred the diabolical carrier who might deliberately sabotage its own aircraft in the hope of reaping a fraudulent insurance recovery. This scenario ignores, of course, the important deterrence provided by the criminal law. Moreover, because of the "accident" requirement in Article 17, it is by no means certain that the protections of the Convention would be available to a carrier that destroyed its own aircraft. Cf. *Floyd II*, 59 U.S.L.W. at 4309 ("an air carrier is liable for passenger injury [under the Convention] only when ... there has been an accident"); *Saks*, 470 U.S. at 406-07 (same). As the dissent's scenario is not before us, we express no opinion on any speculative questions it might or might not raise.

What we can and do say, however, is that whatever evil one might be willing to impute to the corporate mind, the possibility of so wanton an act does not license us to disregard the policy choices made by the Convention's contracting parties. See *Floyd II*, 59 U.S.L.W. at 4312 ("Whatever may be the current view among Convention signatories, in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers, and we read [the terms of Article 17] in a way that respects that legislative choice."). Article 17 of the Warsaw Convention "sets the parameters" of plaintiffs' right of recovery at compensatory damages only. *Gander*, 684 F. Supp. at 932. These parameters are not expanded by Articles 24 or 25. Accordingly, we vacate the jury's award of punitive damages.

KAL argues that the district court committed a second error by failing to undertake a choice-of-law analysis prior to instructing the jury on punitive damages. As we conclude that such damages are not recoverable even if plaintiffs are correct about choice of law, this issue is not

relevant to our disposition of the case. We therefore express no view on this aspect of the dissenting opinion.

III. CONCLUSION

The district court properly left the willful misconduct decision to the jury and did not abuse its discretion in admitting plaintiffs' evidence. The district court erred, however, in allowing plaintiffs to pursue their punitive damage claims, and therefore we vacate the jury's punitive damage award in this case.

So ordered.

MIKVA, *Chief Judge*, dissenting from Part II(C): I do not share my colleagues' conclusion that the Warsaw Convention bars recovery of punitive damages. Instead, I would remand with instructions that the district court engage in a proper choice of law analysis.

A. *Warsaw Convention*

The Warsaw Convention, officially denominated the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, was adhered to by the United States in 1934. *See* 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. App. § 1502, note. The Convention was negotiated with hopes of facilitating the growth of the infant airline industry, and the drafters sought to create a scheme that would presume carrier liability for air disasters but cap monetary liability at a very low level. Article 17 provides that "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger . . ." As the majority explains, this liability appears to cover only compensatory damages. Article 22 originally capped monetary damages at approximately \$8,300 per passenger. That figure was raised to \$75,000 by the 1966 Montreal Agreement for flights to and from the United States (undermining the goal of uniformity for the sake of preventing denunciation by the United States government).

Two other provisions of the Convention are of particular relevance in the instant appeal. Article 24 leaves procedural questions to local law provided that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." This language contemplates the availability of causes of action that are separate from Article 17, though governed by the limitations of the Convention. Finally, Article 25 provides that "[t]he carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct . . ." The dispute before us requires that we carefully sort out the interplay of these various sections.

The majority holds that the Warsaw Convention was intended to provide compensatory relief only, and that therefore punitive damages are not available even in causes of action not based on Article 17. Nowhere are punitive damages explicitly prohibited. In this country, "legislative silence with respect to punitive damages do[es] not preclude such a recovery." *Racich v. Celotex Corp.*, 887 F.2d 393, 396 (2d Cir. 1989); see *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Even so, I am persuaded by the majority's conclusion that Article 17 cannot be read to authorize the recovery of punitive damages for claims based on the Convention. If any of the plaintiffs in these cases premised their complaints solely on a Warsaw Convention cause of action, I would concur in holding that they were not entitled to recover punitive damages. But few if any of the complaints were so limited in pleading only the Convention as a cause of action.

The plaintiffs in these cases brought their damages claims against KAL under a potpourri of legal theories including the Warsaw Convention. In denying KAL's motion to strike plaintiffs' jury demand, the district court untangled the sources underlying each of the plaintiff's complaints and found that most alleged a combination of state and federal claims (both common law and statutory) along with claims based on the Convention. See *In re Korean Air Lines Disaster of September 1, 1983*, 704 F. Supp. 1135, 1151-55 (D.D.C. 1988). Almost all of the complaints alleged something other than merely the Convention as a basis for recovery and several failed to plead the applicability of the Convention at all. See *id.* at 1151 n.40, 1154-55. The district court correctly emphasized that, whatever the cause of action, the claims were all subject to the limitations contained in the Convention.

The majority decides that complaints sounding in other causes of action such as federal maritime law are also not entitled to punitive damage awards. I find this step in the court's logic somewhat difficult to fathom. There appear to be two basic rationales underlying such a conclusion: (1) the Convention provides the exclusive cause of action

(thereby entirely preempting other possible causes of action that might separately allow punitive damages), or (2) Article 17 creates an implicit limitation on liability governing recoveries premised on separate causes of action (a.k.a. partial preemption). The majority appears to employ the latter rationale, but then dismisses the force of Article 25 in part on the strength of decisions premised on the exclusivity rationale. I think neither one is persuasive and therefore respectfully dissent.

1. *Exclusivity*

The majority correctly eschews reliance on the first approach, choosing "not [to] take sides in the exclusivity debate." Maj. Op. at 25 The Convention is not the exclusive remedy for passengers injured on international flights; in fact, Article 24's reference to "any action for damages, however founded" clearly contemplates actions arising under separate sources of law but places some limits on recovery. Courts and commentators have rejected suggestions that the Convention provides the exclusive cause of action for international air disasters. See, e.g., *In re Air Crash in Bali, Indonesia*, 684 F.2d 1301, 1311 n.8 (9th Cir. 1982) ("[T]he Convention has never been read to limit plaintiffs to a cause of action arising thereunder, but rather to limit the recovery in suits for injury."); *Tokio Marine & Fire Insur. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 942 (2d Cir. 1980) ("[T]he Convention draftsmen . . . did not intend that cause of action to be exclusive."); Calkins, *The Cause of Action under the Warsaw Convention*, 26 J. AIR L. & COM. 323, 327-28 (1959).

The Second Circuit just recently decided that the Warsaw Convention prohibits the recovery of punitive damages. See *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, slip op. No. 269 (2d Cir. Mar. 22, 1991). The court took exclusivity as its working premise, see *id.* at 2940-44, 2963, somewhat astonishing in light of the Second Circuit's own precedents. For a long time, that court had held that no cause of action is established by the Convention. See *Benjamins v. British European Airways*, 572

F.2d 913, 919 (2d Cir. 1978) (finally overruling proposition that had been accepted for twenty years), *cert. denied*, 439 U.S. 1114 (1979). In subsequent decisions, the court ruled that this cause of action was not exclusive. See *Tokio Marine*, 617 F.2d at 942. Now, by dismissing the statement in *Tokio Marine* as mere dicta, the Second Circuit has gone full circle from believing that the Convention provides no cause of action to deciding that it provides the sole cause of action for plaintiffs.

Apart from its apparent failure to abide by circuit precedent, the *Lockerbie* court's support for the exclusivity holding is hardly overwhelming. For instance, the court emphasized (at 2942) that other countries have held that the Convention is the exclusive cause of action. These were not interpretations of the Convention, however: the common law countries cited in the opinion all had to *enact* national legislation making Article 17 the exclusive cause of action. The United States has, of course, never done so. Moreover, its description of decisions from other circuits is also somewhat perplexing. For instance, in one case the Ninth Circuit observed that "the delegates did not intend that the cause of action created by the Convention to be exclusive." *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 414 n.25 (9th Cir. 1983). Yet the *Lockerbie* court asserts that the decision "rebutted the idea that a cause of action may be founded on some law other than the Convention." Slip op. at 2941-42.

In fact, the Ninth Circuit has concluded on more than one occasion that the cause of action is not exclusive. See, e.g., *In re Air Crash in Bali, Indonesia*, 684 F.2d at 1311 n.8. All told, the decisions from other circuits appear to be evenly divided on the issue, notwithstanding the court's claim in *Lockerbie* (at 2963) that the weight of authority is fairly one-sided. See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1482 n.33 (11th Cir. 1989) (collecting cases), *rev'd on other grounds*, 59 U.S.L.W. 4307 (April 17, 1991). See also *Alvarez v. Aerovias Nacionales de Colombia S.A.*, 59 U.S.L.W. 2481 (S.D. Fla. Jan. 25, 1991) (distinguishing exclusive *remedy* of the Convention from the suggestion

that it also provides the exclusive cause of action). The Supreme Court has twice now declined to address the exclusivity question. See *Eastern Airlines, Inc. v. Floyd*, 59 U.S.L.W. at 4314; *Air France v. Saks*, 470 U.S. 392, 408 (1985). The fundamental error of the *Lockerbie* court's decision is the premise that the cause of action provided by the Warsaw Convention is exclusive, and my colleagues are wise not to enter this fray unnecessarily.

2. *Implicit Limitation in Article 17*

If the court does not premise its holding on an exclusivity rationale, it must mean that Article 17 acts as a *limitation* on the liability that an air carrier would face when sued under separate causes of action. But then Article 25 would come into play and waive any such limitation in cases of willful misconduct: "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct . . ." Art. 25(1). The majority relies heavily on *Lockerbie* for the proposition that Article 25 does not trump Article 17, but there the court had taken exclusivity as its starting point. It is one thing to say that the Convention prohibits punitive damages because it is the sole available cause of action and does not provide for them; it is quite another to conclude that Article 17 acts as a limitation on damages restricting recovery under other causes of action that allow punitive damages.

The Eleventh Circuit has also decided not to take sides in the debate over exclusivity. In resolving the punitive damages question in *Floyd*, the court first decided that the Convention is not itself a basis for seeking punitive damages. The court concluded that Article 17 was entirely compensatory in tone and rejected plaintiffs' argument that Article 25's reference to willful misconduct implied an exception. See 872 F.2d at 1483-85. Next the court rejected the plaintiffs' effort to seek punitive damages under state common law, holding that state law was preempted to the extent that it was inconsistent with the compensatory scheme of Article 17. See *id.* at 1485-87.

Preemption analysis will not work in this case, however, because we are confronted with two legal schemes that stand in rough equipoise under the Supremacy Clause: the Warsaw Convention and federal maritime law. See *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1161 n.19 (5th Cir. 1987) ("As a ratified treaty of the United States the Warsaw Convention is equal in stature and force as any other domestic federal law."); *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 936-37 (D.C. Cir. 1988). The Convention cannot, therefore, preempt federal law to the extent of any inconsistency with its compensatory tone; Article 17 can only prevent recovery of punitive damages otherwise available under federal maritime law if it is construed as a limit or condition governing damages under Article 24, but then it becomes subject to waiver in cases where Article 25 applies.

The court in *Floyd* also relied on subsequent proposals which would have amended Article 25 so that it would only trump the monetary cap in Article 22. See 872 F.2d at 1483-84 (discussing the Hague and Montreal Protocols). But the original language of Article 25 does not suggest that only Article 22 was covered, and the United States never ratified these amendments. See *id.* at 1468-69. Moreover, the United States responded to the proposed changes by threatening to denounce the entire Convention unless the monetary limits were raised substantially. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 509-16, 532-46 (1967). In *Floyd*, the Eleventh Circuit candidly admitted that this country never ratified the Protocols, but found "their clarification of the operation of Article 25 to be instructive." 872 F.2d at 1484 n.35. This reasoning is difficult to square with the Supreme Court's recent instruction that "where the text is clear . . . we have no power to insert an amendment." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) ("We must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history . . .").

Indeed, in reversing the decision that compensatory damages for purely mental injuries were available under Article 17, the Supreme Court criticized the lower court's interpretation of subsequent drafting history surrounding the Protocols. See *Eastern Airlines, Inc. v. Floyd*, 59 U.S.L.W. at 4312-13. To the extent that the 1955 negotiating history cited by the Eleventh Circuit in *Floyd* reflects the Hague drafters' understandings about what their predecessors may have had in mind a generation earlier, it is entitled to only marginal weight. See *McKelvey v. Turnage*, 792 F.2d 194, 200 (D.C. Cir. 1986) ("As the Supreme Court and this court have repeatedly remarked, the views of later Congresses as to the meaning of enactments by their predecessors are of little, if any, significance."), *aff'd*, 485 U.S. 535 (1988).

At best, the subsequent proposals and accompanying drafting history demonstrate only that the original text was ambiguous. At worst, the proposals imply that the negotiators wanted to adjust the bargain that had been struck originally. Indeed, the amended version of Article 25 proposed in the unratified Hague Protocol would not have simply clarified an existing understanding of Article 25 but represented a revised *quid pro quo*: in exchange for a higher ceiling on damages, carriers sought to narrow the waiver of limitations in cases of willful misconduct. See Lowenfeld & Mendelsohn, at 503-06. See also Comment, *Role of Choice of Law in Determining Damages for International Aviation Accidents*, 51 J. AIR L. & COM. 953, 989 (1986) (discussing Guatemala Protocol which would have eliminated Article 25 altogether in exchange for a higher monetary cap of \$100,000). Thus, the history as well as the language of Article 25 supports the conclusion that punitive damages are not prohibited by the Warsaw Convention in cases of willful misconduct even if a cause of action based solely on the Convention would not authorize such damages.

The majority concludes that allowing punitive damage windfalls would contravene the Convention's primary purpose and understanding of the contracting parties that the

treaty was intended to limit the liability of air carriers. The scheme of the Convention closely resembles workmen's compensation statutes which allow workers to recover prescribed compensatory damages for accidental job-related injuries. These laws reflect a *quid pro quo* between employees, who are relieved of the burden of proof, and employers, who benefit from the cap on damages. See 2A A. LARSEN, WORKMEN'S COMPENSATION LAW § 65.11 (1990), at 12-9. Similarly, the Warsaw Convention balances strict carrier liability for injuries sustained by passengers (Articles 17 and 20) against a cap on monetary damages (Article 22). See *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

However, workmen's compensation laws do not limit the availability of separate damage actions in cases of intentional misconduct by the employer. See, e.g., *Pratt v. National Distillers & Chem. Corp.*, 853 F.2d 1329, 1336-39 (6th Cir. 1988) (punitive damages are available for intentional injuries), *cert. denied*, 489 U.S. 1012 (1989); LARSEN §§ 68.00-.14. Similarly, the narrow exception in Article 25 of the Convention does not undermine the basic purpose of limiting carrier liability; it simply recognizes that in cases of serious misconduct carriers should not enjoy the benefits of these limitations. Imagine that a carrier decided to deliberately sabotage one of its own flights in hopes of receiving a large insurance settlement on the aircraft. If such egregious conduct went undetected, a financially strapped airline could invest a paltry amount in anticipated payments to decedents' estates (on a typical flight of the Concorde, for instance, that might create maximum liabilities of \$500,000 to the passengers) in exchange for a multi-million dollar insurance pay-off. Even if such unthinkable conduct came to light, the maximum compensatory judgment to the plaintiffs might still be less than the potential insurance recovery discounted by the risk that the fraud might be discovered. The majority's decision would completely foreclose the availability of punitive damages even in such an egregious case. While

the facts of the present case are not as stark as those hypothesized, the point remains the same: if plaintiffs can demonstrate willful misconduct, the limitations of the Convention (and the goals that those limitations serve) should have no application.

B. *Choice of Law*

KAL's pre-trial motion to dismiss plaintiffs' punitive damage claims was premised exclusively on its argument that the Warsaw Convention precluded such an award. Near the end of the trial, the district court denied KAL's motion from the bench. Apparently for the first time in the proceedings, KAL's counsel then requested a choice of law analysis, but in a very vague and non-committal way.

The Court: What law should I pick?

Mr. Barry: I don't know.

The Court: Where is this case being tried on the issue of liability?

Mr. Barry: Here in the District of Columbia.

The Court: With respect to damages, this aspect of damages which would ordinarily tail along will be a part of an action on liability and damages, except for the construct of the treaty; I mean, what law would apply?

Mr. Barry: Well, Your Honor, I think you have to do a choice of law analysis, just as Judge Green did in the Air Florida litigation here on this very same issue, and she held that laws of differing jurisdictions were going to apply to different issues.... I don't know the answer to the question I raise only a problem. I wasn't anticipating this, to tell you the truth.

The decision alluded to by KAL counsel was *In re Air Crash Disaster at Washington, D.C. on January 13, 1982*, 559 F. Supp. 333 (D.D.C. 1983) (hereinafter "*In re Air Florida Crash*"). The district court's questions reflect a couple of assumptions: that forum law would automati-

cally govern liability issues and that damages would presumptively be governed by the same jurisdiction's laws. Both premises are questionable: choice of law principles followed by the District of Columbia courts seek to apply the substantive law of the jurisdiction with the closest connection to and greatest interest in a claim, see *Hercules & Co. v. Shama Restaurant Corp.*, 566 A.2d 31, 40-41 (D.C. App. 1989), and separate choice of law analysis of different substantive issues (called "dépeçage") is now routine. See *id.*; *In re Air Florida Crash*, 559 F. Supp. at 341.

The threshold question is whether the choice of law basis for KAL's motion to dismiss the punitive damages claims was raised too late. Unlike jurisdictional issues, courts need not address choice of law questions *sua sponte*. It is not clear whether the District of Columbia would follow a default rule that presumes local law controls unless choice of law objections are raised in a timely manner, but that seems to be the norm. See *Cavic v. Grand Bahama Devel. Co.*, 701 F.2d 879, 882-83 (11th Cir. 1983); Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301 (1989). Although "[t]he choice of law question regarding punitive damages should be resolved as soon as possible," *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, 734 F. Supp. 1425, 1429 (N.D.Ill. 1990) (hereinafter "*In re Iowa Crash*"), Rule 12(h)(2), FED. R. CIV. P., provides that "[a] defense for failure to state a claim upon which relief can be granted . . . may be made . . . [as late as] the trial on the merits." If the short verbal exchange cited above was enough to place the issue before the judge, then the district court should have engaged in a choice of law analysis or at least asked for supplemental briefing at that point. See *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057, 1059-60 n.1 (5th Cir. 1981) (failure to state a claim could be pressed on appeal where defendant had "sufficiently alerted" the court of the defense during trial). KAL preserved the argument, though just barely. Cf. *In re Air Florida Crash*, 559 F. Supp. at 336-37 (rejecting contention that Air Florida "waived" its right to present

a choice of law argument for the first time on reconsideration of the district court's ruling, noting that its "interest in the question arose only when this Court ruled that divergent punitive damages laws would govern these parties' liability").

The next question is whether KAL properly pled that Korean law was applicable. Rule 44.1, FED. R. CIV. P., does not require that a choice of law argument based on foreign law appear in the pleadings. Instead, as the Advisory Committee explained, "[t]he new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable." In a related vein, appellees contend that KAL failed to satisfy the proof requirements in Rule 44.1, but the explanation in the Advisory Committee notes suggests otherwise. See also Pollack, *Proof of Foreign Law*, 26 AM. J. COMP. L. 470 (1978). Along with its memoranda of law in support of its JNOV motion, KAL filed a translation and explanatory letter concerning the relevant provisions of the Korean civil code, and added that "KAL preserved its argument that Korean law applied to the issue of punitive damages by including in each Answer filed in this litigation a 'Notice of Applicability of Foreign Law' pursuant to Fed. R. Civ.P. 44.1." The district court never explicitly rejected KAL's choice of law argument on grounds of being unreasonably late, and I believe it should have been addressed.

The district court entirely failed to engage in the required choice of law analysis. KAL contends that the district court improperly applied D.C. law on the punitive damages question because a proper choice of law analysis would have required reference to Korean civil law. KAL argues that, in multi-district airplane crash litigation, involving plaintiffs from numerous other jurisdictions (both foreign and domestic), the trial court could not just unthinkingly apply forum law to the punitive damages question. Indeed, several other courts have engaged in sometimes agonizing choice of law analyses in similar

cases. See *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594 (7th Cir.); cert. denied, 454 U.S. 878 (1981) (hereinafter "*In re Chicago Crash*"); *In re Iowa Crash*, 734 F. Supp. 1425; *In re Air Florida Crash*, 559 F. Supp. 333. See generally Lowenfeld, *Mass Torts and the Conflict of Laws: The Airline Disaster*, 1989 U. ILL. L. REV. 157.

For state law claims brought in federal court under diversity jurisdiction, the district court must apply the choice of law principles of the state in which it sits. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). When a case is transferred pursuant to 28 U.S.C. § 1407(a) by the Panel on Multi-District Litigation, the transferee court must apply the choice of law rules of the states where the transferor courts sit. See *In re Chicago*, 644 F.2d at 610 (citing *Van Dusen v. Barrack*, 376 U.S. 612 (1964)). No such analysis was undertaken in this case. Cf. *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (per curiam) (reversing federal court's decision to ignore forum state's choice of law rule that would have required application of Cambodian law to wrongful death action). The district court appears to assume that forum law automatically controls and that *dépeçage* is inappropriate, but even application of District of Columbia choice of law principles would dictate otherwise, see *Hercules & Co.*, 566 A.2d at 40-41, and we have no idea what would happen if the district court applied the choice of law principles of each transferor court. The district court erred in failing to undertake a choice of law analysis in this case, a task best left in the first instance to the district court on remand. Even so, it is necessary to explain at some length below why I am unpersuaded by appellees' arguments.

Appellees suggest that their punitive damage claims were not derived from state law but arose from general federal maritime law. In similar circumstances, the Third Circuit held that

the maritime character of the tort brings the controversy under the governance of federal law and it is

immaterial whether admiralty or diversity jurisdiction is relied upon as justification for suing in the federal forum. Obviously, a court thus undertaking to apply federal substantive law would have no occasion to defer to or apply state choice of law rules.

Scott v. Eastern Air Lines, Inc., 399 F.2d 14, 17 (3d Cir. 1967) (plane crash in Boston Harbor), *cert. denied*, 393 U.S. 979 (1968). The district court never explained its refusal to engage in a *Klaxon* choice of law analysis in these terms, though its treatment of KAL's motion to strike plaintiffs' jury demand suggests this reasoning. See *In re KAL Disaster*, 704 F. Supp. at 1151-57. There the district court held that all of the plaintiffs had properly pleaded (or could amend their complaints to so plead) federal maritime claims and the Warsaw Convention as causes of action, see *id.* at 1154, 1155-56 (but recognizing that some plaintiffs had only pled state law claims brought pursuant to diversity jurisdiction).

Even if that was the district court's undisclosed reason for not engaging in a *Klaxon* analysis for each transferor court, it would not relieve the court of the need to engage in *some* choice of law analysis under federal law. See *Lauritzen v. Larsen*, 345 U.S. 571, 575-77 (1953) (finding a conflict between application of Danish and U.S. maritime law). In other words, if application of federal maritime law would authorize punitive damages but Korean law would not, a conflict may exist that needs to be resolved. This is precisely what happened in *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000 (9th Cir. 1987), a case where the court had to decide as a matter of federal choice of law principles whether Polish law or California law provided the measure of recovery in a wrongful death claim arising from a crash in Poland and governed by the Federal Sovereign Immunities Act.

In undertaking the federal choice of law analysis, the court in *Harris* looked to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1969) as "an appropriate starting point." See *id.* at 1003-04. The RESTATEMENT is, however, a dubious choice of law methodology for a federal court

to pick. Choice of law is a very messy field, with different approaches endorsed by competing camps. See *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 739 (C.D. Cal. 1975) (describing it as "a veritable jungle"). In the past, the *lex loci delicti* rule was widely used in tort cases, directing courts to use the substantive law of the jurisdiction where the injury occurred, and vestiges of this much criticized approach remain in the RESTATEMENT. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS (hereinafter "REST.") §§ 145-146, 175 (presumption of applying the local law where the injury occurred unless another jurisdiction has a more significant relationship to the incident or the parties involved). In *Harris*, the court decided to apply Polish law of damages, largely because that was the site of the accident and no other jurisdiction had a demonstrably greater interest in the case. See 820 F.2d at 1004 & n.5. In fact, the *lex loci* starting point used by the RESTATEMENT might be difficult to apply in this case: it is not clear whether KE007 was shot down in Soviet airspace, over Japanese territory or in international waters. Cf. *In re Air Florida Crash*, 559 F. Supp. at 348 n.21 (describing earlier case involving a DC-4 mid-air collision where half of the wreckage fell into the Potomac River (deemed part of the District of Columbia) and the other half fell on the Virginia shore); *In re Air Crash Disaster Near Bombay, India*, 531 F. Supp. 1175, 1182 (W.D. Wash. 1982) (parties disputed whether aircraft crashed in international waters or within India's territorial waters). Indeed, largely because of such uncertainties, the Supreme Court has declined to place much emphasis on the *lex loci* rule in maritime torts. See *Romero v. International Terminal Oper. Co.*, 358 U.S. 354, 384 (1959); *Lauritzen*, 345 U.S. at 583-84.

The RESTATEMENT also endorses an amalgam of the "most significant relationship" (or "center of gravity") test and governmental interest methodologies, see REST. § 6, reflecting an uneasy compromise struck among the drafters. See von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 963-64 (1975). The

governmental interest approach seeks to identify which jurisdictions may have an actual interest in having their substantive law apply to a particular controversy, but the resolution of true conflicts is achieved through different means depending on the variant. See generally G. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1043-50 (1987). Whatever the relative merits of the various approaches, the court in *Harris* went straight to the RESTATEMENT as a good source for general choice of law rules to be used as federal common law in the area.

In counting up the contacts, KAL emphasizes that South Korea is its place of incorporation, its principal place of business, and the place where its crews are trained. Appellees respond that many of the passengers came from, the flight originated in, and all of the tickets were purchased in the United States. They cite a decision that suggests using a "center of gravity" approach like the RESTATEMENT in maritime cases. See *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970). In that case, the Supreme Court applied the Jones Act to a claim by a Greek seaman injured on a Greek ship while it was in American territorial waters, emphasizing that the Greek company that owned the ship had its largest offices in the U.S., was owned by a Greek citizen domiciled in the U.S., and transported cargo to and from the United States. See *id.* at 307-10. But *Hellenic Lines* does not necessarily support appellees' analysis of the relevant contacts in this case because the site of the accident and KAL's principal place of business were not in the United States. See *Romero*, 358 U.S. at 383-84 (applying Spanish law to maritime tort claim brought by a Spanish sailor injured on board a Spanish ship while in American waters); *Lauritzen*, 345 U.S. at 592 (applying Danish law to maritime tort that occurred in Cuban waters because all parties and the ship were Danish, even though the injured sailor embarked on the ship in New York).

Lauritzen employed something akin to the general, multi-factor approach described in section 6 of the

RESTATEMENT, though without the initial presumption for applying the *lex loci* rule:

Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority.

Id. at 582 (the relevant contacts included the place of the wrongful act, the law of the flag, the allegiance or domicile of the injured, the allegiance of the shipowner, the place of the contract, the inaccessibility of a foreign forum, and the law of the forum); *accord Romero*, 358 U.S. at 383. In fact, *Lauritzen* gave the "law of the flag" the same presumptive weight that the RESTATEMENT gives to the place of injury. See 345 U.S. at 585-86 (because the ship was registered in Denmark, Danish law "must prevail unless some heavy counterweight appears").

At least two federal courts have used the contacts discussed in *Lauritzen* to resolve choice of law problems in air disasters on the high seas. In *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (D.N.J. 1958), a case where a Venezuelan airliner crashed in the Atlantic Ocean, the district court held that federal maritime law would govern to impose liability on the U.S. corporation that had serviced the aircraft before departure. The court emphasized that "[t]he parties to the present litigation are American nationals, and neither the foreign carrier nor the Republic of Venezuela appear to have any interest in the outcome." *Id.* at 350-51. In *Air Crash Near Bombay*, 531 F. Supp. 1175, a case where an Air India Boeing 747 crashed into the Arabian Sea shortly after takeoff, the district court held that Indian law would govern product liability claims against the American manufacturers of allegedly defective aircraft components. The court focused on "the essentially Indian character of this aircraft accident in Indian territorial

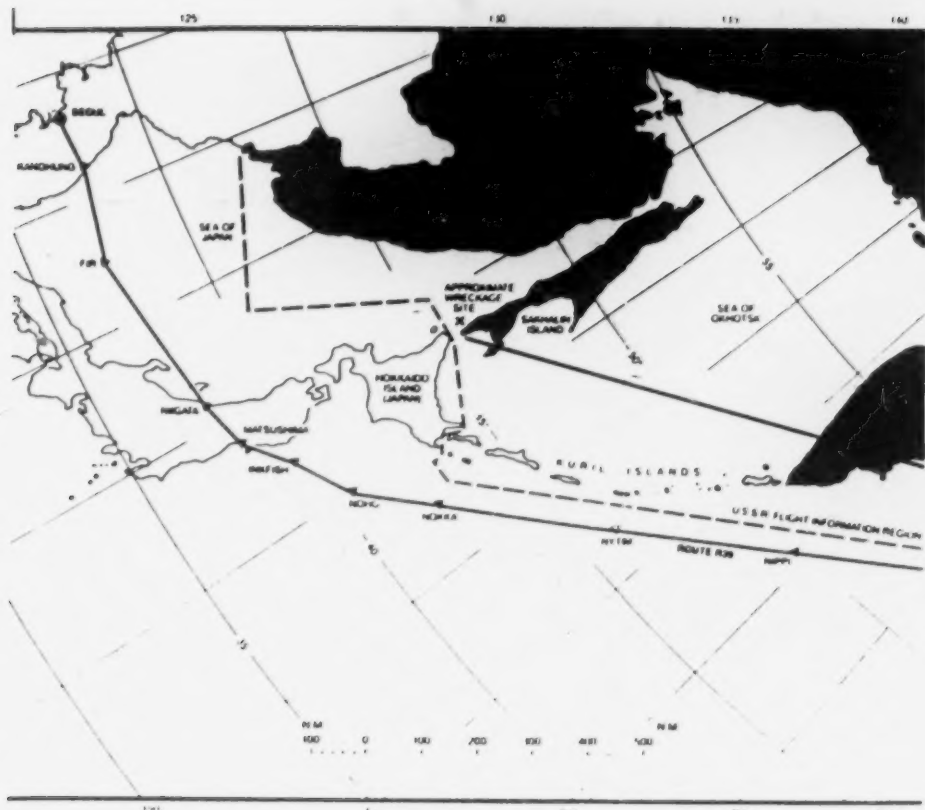
waters on a flight originating in India involving an Indian air carrier and predominantly Indian victims." *Id.* at 1191. This case presents a much sharper conflict, however, because the contacts appear to be more evenly divided and do not point overwhelmingly to one jurisdiction or the other.

As KAL correctly points out, the question of punitive damages is of primary interest to jurisdictions having some link to the defendant. See *In re Chicago Crash*, 644 F.2d at 612-13 (decedents' home jurisdictions only have an interest in recovery of compensatory damages); *In re Air Florida Crash*, 559 F. Supp. at 352-55. Assuming this is not a *Klaxon* thicket, the choice is between recovery of punitive damages under general federal maritime law versus non-recovery under Korean civil law. See *In re Air Florida Crash*, 559 F. Supp. at 347 & n.19, 351. The balancing of competing interests is no easy task, and even trying to decipher what those interests are is an undertaking fraught with difficulties. Even assuming that Korea made a conscious decision to protect home businesses from excessive judgments, an interest it deemed more important than the added increment of deterrence from punitive damages, such a trade-off for purposes of internal Korean law does not mean that other interested jurisdictions cannot choose to apply punitive damages if they have a countervailing interest in punishment and deterrence that is involved in the controversy. In this case, the United States has an interest in both punishing egregious conduct that begins in this country and deterring its future recurrence. The United States' interest in deterring willful misconduct on international flights linked to its borders might well outweigh Korea's more parochial interest in protecting home businesses. Cf. *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719 (applying California dram shop law to accidents caused by Nevada taverns even though Nevada had intentionally immunized its taverns from such liability), *cert. denied*, 429 U.S. 859 (1976).

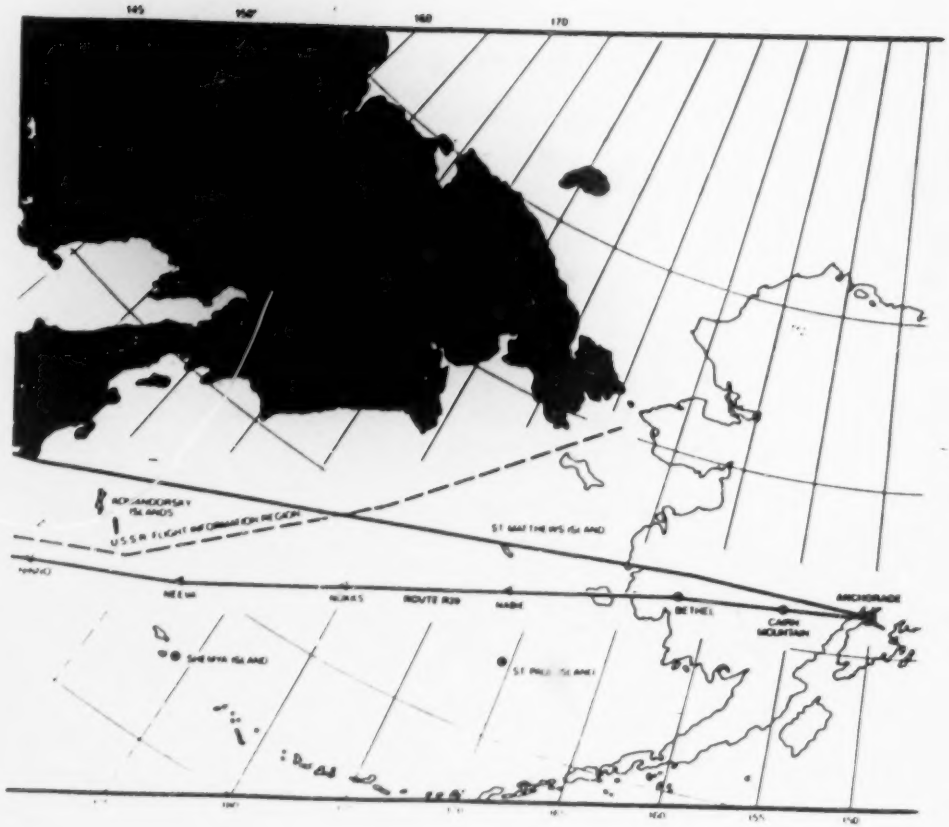
I would therefore remand the punitive damages question to the district court with instructions to engage in a proper choice of law analysis.

A-49

APPENDIX



A-51



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5415—September Term, 1990

CA 83-0345

Filed: July 5, 1991

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

Before:

MIKVA, *Chief Judge*;
BUCKLEY and THOMAS, *Circuit Judges*.

ORDER

Upon consideration of appellant's petition for rehearing,
filed June 5, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: ROBERT A. BONNER

Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5415—September Term, 1990

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Filed: July 5, 1991

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

Before:

MIKVA, *Chief Judge*;
WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN,
BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE,
THOMAS, HENDERSON and RANDOLPH, *Circuit Judges*.

ORDER

Appellant's Suggestion For Rehearing *En Banc* has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: ROBERT A. BONNER

Robert A. Bonner
Deputy Clerk

(2)
No. 91-251

Supreme Court, U.S.

FILED

OCT 2 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

PHILOMENA DOOLEY, *et al.*,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether punitive damages are recoverable in an action governed by the Warsaw Convention?

RULE 29.1 LIST

Korean Air Lines Co., Ltd. is a member of The Hanjin Group of Korea, which comprises companies under common management direction. The 24 affiliated companies of The Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuk Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Travel Information Service Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecommunication Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd., Co., Ltd.
Hanjin Heavy Industries Co., Ltd.
Femtco Shipping Co., Ltd.
Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation—SOGECO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuk Foundation
Inha General Hospital

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-251

PHILOMENA DOOLEY, *et al.*,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, KOREAN AIR LINES CO., LTD. (hereinafter KAL), respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the opinion and decision of the Court of Appeals for the District of Columbia Circuit that punitive damages are not recoverable in a case governed by the Warsaw Convention. That opinion is reported at 932 F.2d 1475, 1484-1490 (1991) and is reprinted in the Appendix to the Petition.¹

¹ References to the Petition appear as "Pet."; references to the Appendix to the Petition appear as "Pet. A- ". References to the Appendix hereto appear as "App."

STATEMENT OF THE CASE

1. The Event and the Nature of the Litigation

On September 1, 1983, a Soviet fighter aircraft deliberately fired upon and destroyed a civilian aircraft operating as KAL flight KE007 from New York via Anchorage to Seoul, Korea. This multidistrict litigation involves over 100 death actions brought against Respondent KAL by the representatives of passengers killed when flight KE007 was shot down. All of the actions save one² are governed by the provisions of the Warsaw Convention³ which, as supplemented by the Montreal Agreement,⁴ limits recoverable damages to the sum of \$75,000 per passenger unless it is proved that the deaths of the passengers were proximately caused by the "wilful misconduct" of KAL within the meaning of Article 25 of the Convention.⁵ Upon such proof, the Convention provides that the recoverable damages are not limited to \$75,000 per passenger and the passenger or his representative are then able to

2 One passenger was not involved in "international transportation" as defined by Article 1(2) of the Warsaw Convention.

3 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. App. § 1502 (Warsaw Convention).

4 Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, note following 49 U.S.C. App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302) (Montreal Agreement).

5 Article 25 provides:

1. The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

2. Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

49 Stat. 3020.

recover the full extent of the compensatory damages sustained.

2. The Liability Trial in the District Court

A single liability trial with respect to all pending actions was conducted in the District Court for the District of Columbia, the multidistrict transferee court. At trial the plaintiffs, Petitioners herein, sought to recover the full extent of the compensatory damages sustained by each of them upon proof of "wilful misconduct" in accordance with Article 25 of the Warsaw Convention. They also sought to recover, upon the basis of federal maritime law, punitive damages in the event Article 25 "wilful misconduct" was found by the jury.

The jury returned a verdict that the shooting down of flight KE007 by the Soviet fighter aircraft, and the resultant deaths of the passengers, were proximately caused by the "wilful misconduct" of the flight crew of flight KE007. As only the common issue of liability was tried, no verdict was returned by the jury as to the extent of the compensatory damages sustained by any plaintiff.

Prior to trial, KAL had filed a motion *in limine* to dismiss all punitive damage claims upon the basis that the Warsaw Convention does not authorize or permit an award of punitive damages. The trial court did not rule on the motion until the end of the trial. App. at 2a. After the jury was instructed on the law as to "wilful misconduct" and had retired to deliberate, the trial court announced that if the jury found that the shooting down of flight KE007 was proximately caused by the "wilful misconduct" of the KE007 flight crew, then the trial court would instruct the jury on punitive damages and have the jury deliberate further as to whether punitive damages should be awarded and if so, in what amount. KAL objected on the same legal grounds as set forth in the unrul ed upon motion *in limine* and upon the further ground that if the trial court denied the pending motion to dismiss the punitive damage claims, a choice of law analysis was

required before any instruction could be given to the jury on the subject of punitive damages. App. at 2a-3a. The trial court disagreed, denied the pending motion *in limine* from the bench and instructed the jury in accordance with the law of the forum, the District of Columbia, as to punitive damages without conducting any choice of law analysis. App. at 3a-4a; 6a-8a. In a subsequent and separate verdict, the same jury on the same day awarded plaintiffs collectively the sum of \$50,000,000 in punitive damages. App. at 8a.

3. The Opinion of the Court of Appeals

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed the jury verdict of "wilful misconduct" but reversed and set aside the judgment entered on the separate verdict awarding plaintiffs \$50,000,000 in punitive damages. That portion of the judgment of the Court of Appeals affirming the "wilful misconduct" verdict is the subject of a cross-petition for writ of certiorari filed by KAL herein. This brief in opposition addresses only the petition for writ of certiorari filed by Petitioners with respect to the judgment of the Court of Appeals reversing and vacating the punitive damage award.

The Court of Appeals held that the "district court erred . . . in allowing plaintiffs to pursue their punitive damage claims" and vacated the punitive damage award. 932 F.2d at 1490; Pet. A-30. The court properly considered the language of the Warsaw Convention, the negotiations of the drafters, the goals and purposes of the treaty and the interpretations given the Convention by contracting states and concluded

that a monetary liability that is punitive and does not compensate for loss suffered would be contrary to the expectations of the jurists who drafted Article 17 and the contracting states that adopted it.

932 F.2d at 1487; Pet. A-23.

The court noted that its conclusion that the Warsaw Convention does not allow for an award of punitive damages

comports with our obligation to construe the Convention in a manner that will promote uniformity. The uniform application of the treaty would be threatened if the United States, alone among contracting states, imposed a form of liability wholly outside the compensatory scheme of Article 17.

932 F.2d at 1487; Pet. A-23-24 (citations omitted).

The court below expressly did not reach or decide the issue whether the Warsaw Convention cause of action is exclusive of all local law causes of actions since the majority decided simply that "punitive damages are contrary to the Convention." 932 F.2d at 1488; Pet. A-25. In so deciding, the court below agreed with the Court of Appeals for the Second Circuit in *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*, 928 F.2d 1267 (2d Cir. 1991), *cert. filed*, No. 91-259 (Aug. 12, 1991). The Second Circuit in *Lockerbie* also held that the Warsaw Convention provides the exclusive cause of action where the Convention applies. *Lockerbie*, 928 F.2d at 1270. The decision of the Second Circuit is the subject of a petition for a writ of certiorari filed August 12, 1991.

Chief Judge Mikva, in dissenting from the punitive damage decision of the court below, viewed the Warsaw Convention as not barring the recovery of punitive damages under local law but noted that he would "remand the punitive damages question to the district court with instructions to engage in a proper choice of law analysis." 932 F.2d at 1499; Pet A-48.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Question Presented for Review Was Not Addressed by the Court Below

Petitioners have presented only the following question for review by the Court:

Does the Warsaw Convention Treaty provide the exclusive cause of action for passenger deaths and injuries in international accidents and bar recovery of punitive damages allowed by applicable federal maritime law?

Pet. at i.

This question, however, was not addressed or decided by the court below, which decided only that the Warsaw Convention bars recovery of punitive damages. In light of this holding, there was no need for the court below to reach the issue whether the Warsaw Convention cause of action is exclusive of causes of action based upon law outside of the Convention. As the question presented by Petitioners cannot be extracted from the opinion and decision below, there is nothing for the Court to review. *See, e.g., Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489 (1991).

In seeking review of the question presented by the petition, *i.e.*, the exclusivity of the Warsaw Convention cause of action, Petitioners attempt to fuse the decision of the court below with that of the Second Circuit in *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*, 928 F.2d 1267 (2d Cir. 1991), *cert. filed*, No. 91-259 (Aug. 12, 1991). The *Lockerbie* court held that the Warsaw Convention creates the exclusive cause of action, preempting all state law causes of action, and does not permit the recovery of punitive damages. Petitioners argue that the court below, in relying upon the *Lockerbie* court's analysis of the Warsaw Convention in relation to the punitive damage portion of the decision, also adopted by implication the *Lockerbie* court's decision that the Warsaw Convention cause of action is exclusive. The court below, however, did not adopt, by implication or oth-

erwise, any part of the *Lockerbie* court's decision regarding the exclusivity of the Warsaw Convention cause of action. In fact, the court below twice referred to the *Lockerbie* court's discussion of the exclusivity issue and expressly declined to reach this question, stating:

In *Lockerbie*, the Second Circuit pointed out that a minority of state courts in the United States view punitive or exemplary damages as serving, at least in part, a "compensatory" function. The court, concluded, however, that the Warsaw Convention preempts all state-law causes of action; otherwise, the uniform application of the Convention would be disrupted by the uneven patchwork of state punitive damages theories . . . *We need not reach this preemption question because plaintiffs here base their claim to punitive damages solely on federal maritime law.*

* * *

Some courts and commentators have concluded that Article 24 preserves independent domestic causes of action based on tort law. Others disagree, taking the view that the Convention, when applicable, provides the exclusive cause of action. *In deciding only that punitive damages are contrary to the Convention, we need not take sides in the exclusivity debate.*

932 F.2d at 1486, 1488 (citations omitted and emphasis added); Pet. A-21-22, 25.

Petitioners erroneously argue that the exclusivity issue is indispensable to the determination of whether punitive damages are recoverable under the Warsaw Convention. As the court below correctly concluded, regardless of what law Petitioners rely upon to support their punitive damage claims, recovery of such damages under any law would be contrary to the Convention and, therefore, cannot be allowed in a Warsaw Convention case. In reaching this conclusion, the

court below analyzed Article 17,⁶ which creates liability for "damage sustained," against the backdrop of the history and purposes of the Convention, and held that Article 17 creates liability for compensatory damages *only*. Because the purpose of punitive damages is "to punish reprehensible conduct and to deter its future occurrence," an award of punitive damages would contravene the compensatory liability scheme created by the Warsaw Convention. *See* 932 F.2d at 1486; A-21. Further, reliance upon law outside of the Convention to support a claim for damages not envisaged by the liability scheme of the Convention is barred by Article 24,⁷ which provides that *any* action for damages can be brought only subject to the conditions and limits of the Convention.

The *Lockerbie* court apparently found it necessary to address the exclusivity issue because the plaintiffs there were claiming punitive damages under various state laws which viewed punitive damage awards as serving a compensatory function. Therefore, the *Lockerbie* plaintiffs argued, an award of punitive damages in such circumstances would not be contrary to the compensatory damage scheme contemplated by Article 17. In rejecting this argument, the *Lockerbie* court held that all state law causes of action are

6 Article 17 provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

7 Article 24 provides:

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

preempted by the Warsaw Convention. This eliminated any legal basis for the punitive damage claims in the *Lockerbie* case since the Second Circuit also held that punitive damages are not recoverable under the Warsaw Convention.

While the *Lockerbie* court may have found it necessary to determine whether state law punitive damage claims are preempted by the Warsaw Convention cause of action, the court below did not have to reach that issue because the punitive damage claims here were based upon federal maritime law,⁸ and federal courts view punitive damages as retributive in nature.

Petitioners argue, alternatively, that if the court below did not use exclusivity as the basis for barring punitive damages, then Article 17 must be treated as a provision which excludes or limits liability and proof of wilful misconduct serves to remove the compensatory damage "limit" of Article 17, thus allowing punitive damages to be awarded. This argument also must fail because it wholly ignores the intended scope and effect of Article 24 when read together with the purpose of Article 17, which is to create but not to limit liability.

The court below decided, simply, that "punitive damages are contrary to the Convention," whether based on local law or otherwise. 932 F.2d at 1488; Pet. A-25. The question of the exclusivity of the Warsaw Convention cause of action was not addressed or decided in the court below. The Court, therefore, should deny the petition which seeks review of a decision not made by the court below.

8 In presenting their question for review, Petitioners ask the Court to assume that federal maritime law is applicable to the punitive damage claim of each plaintiff and that federal maritime law allows recovery of punitive damages in the context of these actions. See Pet. at 11. These assumptions are baseless. There has been no determination in this case that federal maritime law is applicable to any of plaintiffs' claims or that federal maritime law would even allow recovery of punitive damages as part of plaintiffs' survival actions where the deaths occurred on the high seas. Moreover, the trial court did not even apply federal maritime law to the punitive damage claims. See 932 F.2d at 1495; Pet. A-39-40.

2. The Lower Courts Are in Agreement that Punitive Damages Are Not Recoverable Under the Warsaw Convention

The holding of the court below, that punitive damages are not recoverable in actions governed by the Warsaw Convention, is in accord with the decisions of the only other circuit courts that have addressed the issue. As there is no disagreement among the circuit courts of appeals with respect to the only issue decided by the court below, there is no conflict for the Court to resolve.⁹

Petitioners would have the Court accept that the court below created an exclusion of damages intended to be recoverable under the Convention. Petitioners argue that because the common law allows recovery of punitive damages and the treaty is silent as to their recoverability, the court's holding "constitutes a judicial alteration" of the Warsaw Convention. Pet. at 15. The court below, however, did not create or impose any bar to damages to which Petitioners are entitled under the Convention. Rather, the court honored the Court's precept of "giv[ing] the specific words of the treaty a meaning consistent with the shared expectations of the contracting

9 As the court below did not decide the exclusivity issue, Respondents will not discuss in detail the state of the law in the lower courts with respect to that issue, except to note that Petitioners have failed to demonstrate a conflict with respect to the exclusivity issue as well. The Ninth Circuit cases relied upon by Petitioners do not present a conflict with the Second Circuit's decision in *Lockerbie* because the Ninth Circuit has *never* addressed the issue presented by Petitioners, did not address the issue in the cases relied upon by Petitioners and has never *held* that the Warsaw Convention cause of action is not exclusive. See *Johnson v. American Airlines, Inc.*, 834 F.2d 721 (9th Cir. 1987); *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983); *In re Aircrash in Bali, Indonesia, on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982).

Likewise, *Sheris v. Sheris Co.*, 212 Va. 825, 188 S.E.2d 367, *cert. denied*, 409 U.S. 878 (1972), is of no precedential value because it relied upon *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957), a Second Circuit case which was overruled in 1978 by *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

parties,"¹⁰ by holding that the purposes served by punitive damages are incompatible with the compensatory damage scheme in Article 17 and with the intent of the Convention's drafters. Thus, the court below correctly refused to insert into the treaty a right of recovery not intended by the drafters and not authorized by the language of the treaty. See *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); see also *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489 (1991).

In reaching its decision, the court below analyzed the text of the treaty and concluded that Article 17 creates liability for compensatory damages only. Since Article 24 expressly requires any action for damages to be brought subject to the conditions and limits set forth in the Convention, the court below correctly determined that Article 24 "provides a clear textual basis for concluding that the Convention overrides liability awards that are inconsistent with Article 17." 932 F.2d at 1488; Pet. A-25. The court below further concluded that a finding of wilful misconduct under Article 25 does not create a right to recover punitive damages because the basic liability terms of Article 17 are not "limitations" that can be displaced when wilful misconduct is found. 932 F.2d at 1488-89; Pet. A-26-27. Thus, the court vacated the punitive damage award because punitive damages are outside the "parameters" of the Convention's compensatory damage scheme and "these parameters are not expanded by Articles 24 or 25." 932 F.2d at 1490; Pet. A-29.

In holding that punitive damages were not envisaged by the drafters and signatories to the Convention, the court below recognized that the basic purpose of the treaty was to create a right of recovery against air carriers where none previously existed, while at the same time to limit that recovery. The court properly chose not "to disregard the policy choices made by the Convention's contracting parties." 932 F.2d at 1490; Pet. A-29.

The court below also considered the subsequent interpretation of the Convention by common law signatories and the

10 See *Air France v. Saks*, 470 U.S. 392, 399 (1985).

nature of damages recognized by some civil law signatories. 932 F.2d at 1487; Pet. A-23. Petitioners attempt to create the impression that the court ignored these areas of inquiry in its analysis, yet it is Petitioners who have failed to set forth a single reported case in which a court of any other nation has awarded punitive damages in a Warsaw Convention case. Pet. at 15-16.

Finally, the holding of the court below is consistent with that of the Second and Eleventh Circuits, the only other courts of appeals that have considered the issue whether punitive damages are recoverable under the Warsaw Convention. In *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1486 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991), the Eleventh Circuit determined that Article 17 of the Convention creates liability for personal injury and is "entirely compensatory in nature." On this basis, the Eleventh Circuit held that an award of punitive damages would be in conflict with the scheme of liability provided for in the Warsaw Convention. The court there reached its conclusion after an exhaustive analysis of Articles 17, 24 and 25 and the history and goals of the Convention. Likewise, the Second Circuit in *Lockerbie* thoroughly analyzed the text, history and purpose of the Warsaw Convention in holding that punitive damages are barred by the Convention. These courts also noted with approval the decisions of the district courts in *In re Air Crash Disaster at Gander, Newfoundland on December 12, 1985*, 684 F. Supp. 927 (W.D. Ky. 1987) and *Harpalani v. Air India, Inc.*, 634 F. Supp. 797 (N.D. Ill. 1986), both of which held that punitive damages are not recoverable under the Warsaw Convention.

The cases relied upon by Petitioners, all district court cases, are completely devoid of any analysis of the language and history of the Convention and display no effort to impart a meaning to the treaty consistent with the intent of the signatories. For example, in *Hill v. United Airlines*, 550 F. Supp. 1048, 1056 (D. Kan. 1982), the court denied defendant's summary judgment motion, holding simply that plaintiffs sufficiently pled a claim for wilful misconduct which

“might entitle plaintiffs to recover actual and punitive damages” in excess of the Convention’s limits. The court there did not delve into the issue whether the Convention permits recovery of punitive damages. In this case, the trial court simply submitted the claim for punitive damages to the jury under the law of the forum, over KAL’s objection, after the jury rendered its verdict of wilful misconduct. *See* App. at 2a-3a; 6a-7a. The trial court had failed to address the issue prior to that time, despite the pendency of KAL’s motion to strike the punitive damage claims and offered no explanation or rationale for its decision, except to state:

. . . in the scheme of things, our view of the treaty differs from your view.

App. at 3a.

The only other district court to address the issue directly and conclude that punitive damages are recoverable under the Warsaw Convention was the district court in *In re Hijacking at Karachi International Airport, Pakistan on September 5, 1986*, 729 F. Supp. 17 (S.D.N.Y. 1990), a decision reversed by the Second Circuit in *Lockerbie*, 928 F.2d 1267 (2d Cir. 1991).

A review of the lower court decisions which have addressed the issue, even in passing or in *dicta*, reveals that the claimed conflict simply does not exist.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL 565/Misc. 83-345
Washington, D.C.
August 1, 1989
9:41 a.m.

IN RE: KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983

VOLUME 12

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE CHIEF JUDGE
AUBREY E. ROBINSON, JR.,
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

For the Plaintiffs:	DONALD MADOLE, ESQ. MILTON SINCOFF, ESQ. GEORGE FARRELL, ESQ. STEVEN R. POUNIAN, ESQ.
For the Defendant:	GEORGE N. TOMPKINS, ESQ. MARSHALL TURNER, ESQ. DESMOND BARRY, ESQ.
Court Recorder:	Mary Thomas
Transcription Service:	Deposition Services, Inc. 600 East Jefferson Street Suite 103 Rockville, MD 20852 (301) 738-1042

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

[1644] THE COURT: But those passengers who are involved in this litigation are parties plaintiff, are they not?

MR. TOMPKINS: No, there is a lot of duplication.

MR. SINCOFF: Your Honor, can we refer that—when you gave us dispensation to read the list of the decedents to the jury during the voir dire, 138 names of the passengers were read by Mr. Madole to the jury.

THE COURT: That is the figure you want to use?

MR. SINCOFF: Yes, Your Honor.

MR. TOMPKINS: I would have to check the accuracy of the number of passengers, Your Honor. I don't have that information available.

THE COURT: Well, that is the figure—if you agree on that figure, I have no problems with it, but I don't intend to have anybody not in this case participate in it. That makes no sense.

So when you get that figure, whether it is 138 or whatever it is, we will decide on it. Now you can put on the record now your objection to the whole business because I have been through that, but you know exactly why I am doing it, exactly, and I have no alternative.

MR. BARRY: Your Honor, pre-trial we made a motion pursuant to Rule 12H2 of the Federal Rules of Civil Procedure dismissing all claims for punitive damages as a matter of law.

We have submitted a Memorandum of Law in support of [1645] that, and I assume from this discussion that you are denying that Motion to Dismiss.

THE COURT: Your exception is very well-founded for the simple reason that if there is any basis for the opposition, that basis alone would be a cause for retrial, even if we get by all the other hurdles.

This is the only jury—this or anyone on the subject of retrial of the action, which would mean still another single jury, which that could be put in the nature of litigation, only one, and I can see no alternative to it.

If we don't get to that stage, then that is the way the thing was set up because they don't know anything about it at this juncture, nothing.

It is not like we wound it all in and then withdrew it from them. That would screw up the whole thing, as you well know.

They don't know anything about it, and that is the problem, and your memoranda are very well-written. I have read them, and I have gone around and around in my own mind and with my clerk about it, but in the scheme of things, in the scheme of things, our view of the treaty differs from your view.

MR. BARRY: I understand your ruling, Your Honor. I just wanted to make sure the record was clear. Now the other thing that I think Your Honor is going to have to deal with [1646] should the verdict come in against us and you submit this issue to the jury is what law is going to apply because this is a case—passengers against the airline are governed by the Warsaw Convention.

Now if you are going to have punitive damages, you are going to have to determine what law is applied, and Mr. Sincoff says that is not a—that under the law they are entitled to see corporate worth or whatever; my question is, What law?

And I think we are going to have to make a determination on that. I just—you know, yesterday in the conference the term “hornets’ nest” came up, and I think this fits into that category.

THE COURT: I don't understand. I don't follow you when you say what law.

MR. BARRY: Well, are we going to apply the law of the District of Columbia to Korean Air Lines? The issue of punitive damages for an accident that occurred on the high seas as a result of a shootdown by the Russians on a flight from New York to Seoul.

THE COURT: What law should I pick?

MR. BARRY: I don't know.

THE COURT: Where is the case being tried on the issue of liability?

MR. BARRY: Here in the District of Columbia.

[1647] THE COURT: With respect to damages, this aspect of damages which would ordinarily tail along with will be a part of an action on liability and damages, except for the construct of the treaty; I mean, what law would apply.

MR. BARRY: Well, Your Honor, I think you have to do a choice of law analysis, just as Judge Green did in the Air Florida litigation here on this very same issue, and she held that laws of differing jurisdictions were going to apply to different issues.

I don't know the answer to the question, to be very honest with you. You can make a ruling that the law of the District of Columbia applies. That is your ruling.

I am just not sure. I raise only a problem. I wasn't anticipating this, to tell you the truth.

THE COURT: When he constructed this whole multidistrict thing, there were a lot of problems they hadn't anticipated, and we have had to work them out, you know, case by case, year by year, with all kinds of analysis.

MR. BARRY: Anyhow, Your Honor, you have my exception.

THE COURT: And in a sense, we—pardon? Yes, and the record is very clear because your motion, your Points and Authorities, the opposition to your reply to it are all a matter of the complete record, and there is nothing in that that you withdraw concerning your opposition to this Court [1648] considering this whole matter.

MR. BARRY: Absolutely not.

THE COURT: That is all a matter of record, and I am not unwilling to listen to you restate it, but I am just saying that I think—

MR. BARRY: I see no reason to restate it, Your Honor.

THE COURT: The record is very clear.

MR. BARRY: It is set forth fully in our papers.

THE COURT: The record is very clear.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL 565/Misc. 83-345
Washington, D.C.
August 2, 1989
2:15 p.m.

IN RE: KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983

VOLUME 13
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE CHIEF JUDGE
AUBREY E. ROBINSON, JR.,
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

For the Plaintiffs:	DONALD MADOLE, ESQ. MILTON SINCOFF, ESQ. GEORGE FARRELL, ESQ. STEVEN R. POUNIAN, ESQ.
For the Defendant:	GEORGE N. TOMPKINS, ESQ. MARSHALL TURNER, ESQ. DESMOND BARRY, ESQ.
Court Recorder:	Mary Thomas
Transcription Service:	Deposition Services, Inc. 600 East Jefferson Street Suite 103 Rockville, MD 20852 (301) 738-1042

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

[1680]

* * *

THE COURT: As I understand it, you cannot come to any agreement with respect to a figure. Under those circumstances, I think that the figure, then, can just be left out. I believe we had discussion with respect to this next phase. I want to make sure that that discussion we can put on the record or repeat any discussion that we had.

It is my understanding that your position was made very clear in the motions that were filed with respect to this issue. It is also my understanding that there were no additional arguments that you wanted to make in that connection. Am I correct, Counselor?

MR. BARRY: That is correct.

THE COURT: All right. So, if that is true, I think the state of the record will be that the positions of each side are a matter of record, as well as the Court's determination about presenting this issue to this jury. I do not think there will be any confusion on the record.

All right. There is one other thing. All right. Have the jury come in.

[1681] (Jury in.)

THE COURT: We have more work for you. I know you are surprised, and for reasons I cannot detail for you now, it was inadvisable, legally inadvisable, for you to consider the matter about which I am going to speak until certain other determinations had been made.

Now, because you have found that the action or inaction of KAL flight crew amounted to willful misconduct; and you have also found that the willful misconduct was the proximate cause of the passengers' deaths, I am now going to instruct you on punitive and exemplary damages. As I have already instructed you, other juries will determine plaintiffs' actual damages.

However, in addition to actual damages, the law permits the jury under certain circumstances to award an injured person punitive and exemplary damages in order to punish the wrongdoer for some extraordinary misconduct, and to serve

as an example or warning to others not to engage in such conduct.

Now, because the decision whether to award punitive and exemplary damage depends upon the jury's view of the degree of the defendant's misconduct, and the juries that will be awarding actual damages will not be hearing the evidence on KAL's misconduct, the Court has determined that you should be the jury to determine whether punitive [1682] and exemplary damages should be awarded—and if so, how much should be awarded.

Having found willful misconduct by the flight crew of KAL and that such willful misconduct was the proximate cause of the passengers' death, you must now determine whether the acts that you found to have constituted willful misconduct were wantonly done. And if you find so, you may award as punitive and exemplary damages such amount as you shall unanimously agree to be proper.

Now, an act or failure to act is wantonly done if done in reckless or careless disregard of or indifference to the rights of one or more persons, including the injured person. Whether or not to make any award of punitive and exemplary damages, which will be in addition to the actual damages determined and awarded by other juries, is a matter that is exclusively within the province of this jury.

In contrast to actual damages which must be awarded when liability is determined, the decision to award punitive and exemplary damages is discretionary. It is dependent upon your judgment whether such damages are necessary to punish defendant for its extraordinary misconduct and to deter others from engaging in such conduct.

[1683] The decision whether to award punitive damages and exemplary damages and how much to award must be unanimous. You should bear in mind not only the conditions under which and the purposes for which the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason—and must never be either

awarded or fixed in amount because of any sympathy or bias or prejudice with respect to any party in the case.

If you unanimously determine that plaintiffs are entitled to punitive and exemplary damages, then you shall award a single sum, which single sum shall be divided equally between the plaintiffs in this action. If you unanimously determine that plaintiffs are not entitled to punitive and exemplary damages, then you shall return a verdict of no punitive damages on a Special Verdict Sheet that I will give you.

The Verdict Sheet is very simple. I will have copies of this simple instruction sent to you in a very few minutes. So you will retire to consider this matter about which I have just instructed you.

(The jury retired to deliberate at 2:30 p.m.)

* * *

[1687] (Jury in at 4:40 p.m.)

* * *

VERDICT

THE COURT: "We, the jury, unanimously determine that the plaintiffs are entitled to punitive damages in the amount of fifty million dollars." And this is signed by each of the members of the jury. Would you file this, please?

THE CLERK: Yes, Your Honor.